

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LISA MICHELLE LAMBERT

Petitioner

v.

MRS. CHARLOTTE BLACKWELL,
SUPT., et. al.

Respondents

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NO. 01-CV-2511

MEMORANDUM

Anita B. Brody, J.

April 1, 2003

INTRODUCTION

_____ I am aware of the human tragedy that rests at the core of this litigation. The narrative before me begins with abuse and jealousy and ends with shattered lives. It is about the victim, Laurie Show, whose murder at age 15 left her parents childless. It is also about the defendant, Lisa Michelle Lambert, who entered prison at age 18 with a life sentence and no possibility of parole. Although tragic, these facts cannot, and do not, alter my judicial responsibilities: Congress has narrowly defined and circumscribed my role in this litigation.

The contentious history of this case could also overshadow the laws that govern both the case and my role as a United States District Court judge. For this reason, I will briefly describe the role of a federal district court judge in reviewing state court criminal convictions and the impact of state court decisions on my review of an application for a

writ of *habeas corpus*.¹ Because Lisa Michelle Lambert's case began with her conviction in state court, before addressing the scope and nature of federal habeas corpus review, I will describe the procedure for handling criminal cases in the Pennsylvania state courts.

Ordinarily, the states, not the federal government, have the power to enact and enforce the laws that relate to homicide. This explains why the district attorney of Lancaster County, Pennsylvania, an offshoot of the state prosecutor's office, brought the charge of homicide against Lisa Michelle Lambert and why the Honorable Lawrence F. Stengel, a judge of the Commonwealth of Pennsylvania sitting in Lancaster county, tried and sentenced her. In Pennsylvania, all direct appeals from a guilty verdict in a criminal case are presented to the Pennsylvania Superior Court, which has a duty to hear all such appeals. A defendant may also ask the state's highest court, the Pennsylvania Supreme Court, to review an adverse decision of the Pennsylvania Superior Court. However, the Pennsylvania Supreme Court, unlike the Pennsylvania Superior Court, is not required to hear all appeals. That is, it may refuse to hear the appeal. Whether the Pennsylvania Supreme Court hears the case or refuses to hear the case, a criminal defendant may request review before the United States Supreme Court. Such review is rarely granted.

In addition to appealing directly to the Pennsylvania Superior Court and the Pennsylvania Supreme Court, a criminal defendant in Pennsylvania can seek state court relief through a petition for collateral review of his or her conviction. Under the Pennsylvania Post Conviction Relief Act (the "PCRA"), a convicted defendant who has appealed his or her conviction to the Pennsylvania Superior Court, and has been unsuccessful, can also file a petition with the trial court (the "PCRA court") seeking a new trial or an acquittal based on, among other things, violations of the Constitution of the Commonwealth of Pennsylvania or the Constitution or laws of the United States that

¹ The legal remedy of a writ of *habeas corpus* provides a person in custody a means to challenge a deprivation of his or her liberty that rises to the level of a violation of the United States Constitution. It is specifically referred to in the United States Constitution.

undermined the reliability of the conviction. A petitioner may appeal a denial of a PCRA petition to the Pennsylvania Superior Court and the Pennsylvania Supreme Court.

It is only after a defendant in state court has exhausted his or her state remedies – direct appeal and collateral challenges under the PCRA -- in the state courts that he or she can petition for habeas corpus relief in the federal courts. To apply to the United States District Court for a writ of habeas corpus, a petitioner must assert that the petitioner's conviction violated the United States Constitution. If a petitioner fails to allege a constitutional violation, the federal court must deny his or her habeas petition. The alleged errors raised in the federal habeas proceeding must be the same as those errors previously presented to the state courts. If a defendant fails to present the alleged error during direct or collateral review, his or her habeas petition will be "procedurally defaulted" as to that claim. Procedural default will be excused only where the petitioner establishes either "cause and prejudice" for the default or that he or she is "actually innocent" of the crime.

It is against this procedural background that Congress passed and President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). This legislation amended federal habeas law by further narrowing the availability of federal habeas corpus relief. For example, the AEDPA imposes a strict statute of limitations period for filing habeas petitions as well as restrictions on successive petitions. While federal habeas law always incorporated concepts of comity, that is respect for state courts, into its jurisprudence, the AEDPA required increased deference by federal judges to state courts' factual findings and legal conclusions. Thus, under the AEDPA the federal court must uphold a state court ruling unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). As Justice Stevens observed of federal

habeas practice generally, and the AEDPA specifically, "it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions, before concluding that those proceedings were infected by constitutional error sufficiently serious to warrant the issuance of the writ." Terry Williams v. Taylor, 529 U.S. 362, 386, 120 S. Ct. 1495 (2000).

As Terry Williams points out, under the AEDPA a federal judge has a limited role in evaluating habeas petitions filed by individuals convicted in state court. These limitations are both procedural and substantive in nature. The procedural limitations stem from the requirement that a federal habeas petitioner contest his or her conviction through a series of state court appeals and that he or she present any allegation of constitutional error to a PCRA court. The substantive limitations arise from the federal court's restricted ability to make findings contrary to those expressed in earlier state court decisions. The role of the federal court, under the AEDPA, is highly restrictive: The court's task is to evaluate only those claims of constitutional error previously litigated in state court, or those claims which excuse procedural default, and this evaluation is to be performed with great deference to the state court's factual findings and legal conclusions.

Lisa Michelle Lambert was tried and convicted in a Pennsylvania state court.

Adjudication of her federal habeas petition is subject to the AEDPA and the limitations described above. Thus, I must first consider the threshold issue whether the AEDPA's procedural requirements bar review of Lambert's petition. Resolution of this issue requires deciding whether Lambert has complied with the AEDPA's conditions and deadlines for filing a federal habeas petition. Lambert has satisfied these requirements. I will therefore examine the merits of her petition.

After reviewing and analyzing the legal and factual determinations of the Pennsylvania state courts in this light, I find that Lambert has failed to satisfy the AEDPA's exacting standard for overturning a state court conviction. Therefore, I will deny her petition.²

CHRONOLOGY

- December 20, 1991** Lisa Michelle Lambert ("Lambert") is charged with first degree murder and conspiracy to commit murder in the death of Laurie Show.
- July 27, 1992** The Honorable Lawrence F. Stengel of the Lancaster County Court of Common Pleas finds Lambert guilty of first degree murder and conspiracy to commit murder. Lambert is represented at trial by Roy D. Shirk, Esq. and Alan G. Goldberg, Esq.
- July 28, 1992** Lambert files her first set of post-trial motions, claiming that the trial court erred by:
- (a) Denying Lambert's motion for change of venue and/or venire.
 - (b) Denying Lambert's motion for sanctions.
 - (c) Denying Lambert's motion and allowing into evidence the statement of Tabitha Buck.
 - (d) Allowing the trier of fact to take notes during testimony at trial and to use the notes during deliberation.
 - (e) Affirming and reading the Commonwealth's number 3 and 4 of the Commonwealth's Points for Charge.
 - (f) Denying Lambert's motion for mistrial based on not receiving supplemental discovery regarding Laura Thomas.

² The present posture of this case is markedly different than in prior hearings. I have the benefit of the PCRA court review and also shoulder additional responsibilities relating to that review.

(g) Denying Lambert's motion for mistrial based on not receiving supplemental discovery regarding Hazel Show.

(h) Denying Lambert's motion for mistrial based on not receiving supplemental discovery regarding Richard Kleinhans.

(i) Denying Lambert's motion for mistrial based on the prosecution withholding evidence that they had knowledge that a jergo was thrown away and were informed of its location.

(j) Qualifying Dr. Enrique Penades as an expert in forensic pathology because Panades is not board certified in forensic pathology.

(k) Denying Lambert's motion for mistrial based on the prosecution withholding from discovery a portion of Yunkin's statement on February 4, 1992.

(l) Denying Lambert's motion for mistrial based on the Assistant District Attorney asking of witness Samuel J. Golub two questions he knew were beyond the expert witness' field of expertise.

(m) Sustaining a verdict of murder in the first degree and criminal conspiracy to commit criminal homicide against Lambert on the basis of insufficient evidence; the Commonwealth failed to prove the charges and the verdict was based on suspicion, conjecture, and assumption.

(n) Sustaining a verdict of murder in the first degree and criminal conspiracy to commit criminal homicide against Lambert even though the verdict was against the weight of the evidence, the Commonwealth failed to prove these charges, and the verdict was based on suspicion, conjecture, and assumption.

July 19, 1994 The trial court denies Lambert's first set of post-trial motions. The trial court finds that Lambert's presence in Show's home and participation in the attack on Show "by her own admission, would support a finding of criminal responsibility for the death of Laurie Show on an accomplice basis."

October 3, 1994 After obtaining new counsel, Jules Epstein, Esq., Lambert files a second set of post-trial motions for a new trial on the grounds that:

(a) Trial counsel was ineffective in failing to secure and present evidence of Lambert's good character, even though he was aware that such witnesses were available.

(b) Trial counsel was ineffective in failing to present evidence and witnesses to substantiate petitioner's testimony that she had been physically and psychologically abused by Yunkin; this evidence would have corroborated petitioner's claim that she accepted blame for Yunkin's role in the homicide out of fear and to protect her abuser. Also, this evidence undercuts the Commonwealth's theory that Lambert murdered Snow out of jealousy.

(c) Trial counsel was ineffective because he failed to produce evidence that the Commonwealth witness Laura Thomas was on juvenile probation, and that this evidence was critical to determining the credibility and admissibility of her testimony.

(d) Trial counsel was ineffective because he presented a witness who testified that the deceased's claim of date rape against Yunkin was false, undercutting the defense's own theory that Yunkin killed the deceased, and thus did not benefit the petitioner.

(e) Trial counsel was ineffective because despite available witnesses he failed to present evidence of the bad reputation for veracity of witness Laura Thomas.

(f) Trial counsel was ineffective because he failed to move to suppress Lambert's inculpatory statement to the police. The custodial interrogation of the petitioner proceeded in the absence of a warning to Lambert that she was being questioned regarding Snow's death, a defect that was fatal to establishing the admissibility of this statement.

(g) Trial counsel was ineffective because he failed to seek a new trial based on after discovered evidence.

March 14, 1995 After an evidentiary hearing, the Court of Common Pleas denies Lambert's second set of post-trial motions.

January 4, 1996 The Pennsylvania Superior Court affirms the judgment of Lambert's sentence by the Court of Common Pleas of Lancaster County. See Commonwealth v. Lambert, 450 Pa. 714, 676 A.2d 283 (1996) (table).

January 4, 1996 Lambert files a petition for an allowance of an appeal (allocatur) with the Pennsylvania Supreme Court. Lambert seeks appeal based on two issues:

(a) Is not a new trial required when the sole cooperating witness claims at trial that he knew nothing of the crime prior to its commission and was only an accessory after the fact, but admits, after trial, that he had lied under oath, and was in fact guilty of murder?

(b) Is not counsel ineffective when: (i) confronted with an attack on his client's character, he fails to secure and present evidence of good character; and (ii) fails to present compelling evidence of physical abuse to explain why petitioner initially accepted blame for a crime committed by her abuser.

July 2, 1996 The Pennsylvania Supreme Court denies Lambert's petition for an allowance of an appeal.

September 12, 1996 Lambert files a federal habeas petition pro se in the United States District Court for the Eastern District of Pennsylvania.

September 30, 1996 Lambert's time for filing an appeal with the United States Supreme Court expires. Direct review becomes final for the purposes of the Antiterrorism and Effective Death Penalty Act.

October 4, 1996 The district court appoints Christina Rainville, Esq. of the firm of Schnader Harrison Segal & Lewis, LLP to represent Lambert.

January 3, 1997 Lambert's First Amended petition incorporates the claims previously presented to the state courts, but goes further, advancing the following grounds for relief:

(a) Lambert was actually innocent and no credible evidence supported the prosecution's theory of her guilt or the findings of the state trial court.

(b) the misconduct of the prosecution and the police created a situation of manifest injustice. The alleged misconduct included altering Lambert's statement to the police; creating a false crime scene photograph to discredit her; knowingly presenting perjured testimony and failing to take remedial measures after the perjury was confirmed; knowingly presenting "expert" testimony that was scientifically incredible while tampering with the defense's expert; altering evidence and witness statements; failing to disclose Brady and Giglio evidence; and losing other exculpatory evidence.

(c) after-discovered evidence created a situation of manifest injustice allegedly consisting of alterations of Lambert's statement; alteration of crime scene evidence; scientific testing of clothing

worn by Yunkin; photographs of the crime scene which revealed additional writing in blood by the victim that exculpates Lambert; autopsy report notes revealing the time of the victim's death; injuries incurred by the "real" killers, Yunkin and Buck; testing of blood found on the victim's ring; statements made by Yunkin and Buck to their friends; and, the subsequent admission by the prosecution that the primary witness – and one of the alleged real killers against Lambert had committed perjury at Lambert's trial; and

(d) trial counsel was ineffective in over 35 separate ways.

April 21, 1997 The United States District Court for the Eastern District of Pennsylvania in an opinion by the Honorable Stewart Dalzell grants Lambert relief on the basis of her federal *habeas corpus* petition. Lambert is released into the custody of her attorneys.

September 30, 1997 Lambert's time for filing a PCRA petition expires. In the absence of tolling, Lambert's time for filing a federal habeas petition also expires.

December 29, 1997 The Court of Appeals for the Third Circuit (the "Third Circuit") vacates the Order of the district court granting Lambert's petition for a writ of *habeas corpus* and remands the case to the district court with direction to dismiss Lambert's petition without prejudice.

January 26, 1998 The Third Circuit denies Lambert's petition for rehearing *en banc*.

February 2, 1998 Lambert files a petition in the Lancaster County Court of Common Pleas seeking relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"), claiming 157 allegations of prosecutorial misconduct, including 66 allegations of Brady / Giglio violations, 72 allegations of after-discovered evidence, and 28 allegations of ineffective assistance of counsel.

February 3, 1998 Pursuant to the Third Circuit's order, the district court dismisses Lambert's petition without prejudice

February 4, 1998 Lambert surrenders.

April 23, 1998 Lambert petitions the Supreme Court of the United States for a *writ of certiorari*.

April 30, 1998 The Court of Common Pleas of Lancaster County (the "PCRA court") begins six weeks of hearings on Lambert's PCRA petition.

May 6, 1998 A two judge motions panel of the Third Circuit grants Lambert's bail application.

August 3, 1998 An *en banc* court of the Third Circuit reverses the decision of the motions panel granting Lambert's bail application.

August 24, 1998 The PCRA court denies Lambert relief on her PCRA petition.

March 1999 Because the Pennsylvania Superior Court declines to relax its page limit rule, to afford Lambert the necessary space on which to brief her arguments, Lambert files a Second Amended Habeas Petition in the district court. In view of the pendency both of Lambert's appeal in the Pennsylvania Superior Court and of her petition for a writ of certiorari in the United States Supreme Court, the district court takes no action on the petition.

August 27, 1999 The Pennsylvania Supreme Court decides Commonwealth v. Fahy, 737 A.2d 214 (Pa. 1999) (holding that jurisdictional time limits of the PCRA go to a court's right or competency to adjudicate a controversy, and therefore must be interpreted literally).

May 9, 2000 The Supreme Court of Pennsylvania issues Order No. 218 which provides:

AND NOW, this 9th day of May, 2000, we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this court will be allowed only when there are special and important reasons therefor. Pa.R.A.P. 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal *habeas corpus* relief.

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been denied relief in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal *habeas corpus* relief. This Order shall be effective immediately.

December 18, 2000 The Pennsylvania Superior Court affirms the decision and "preserves" the factual findings of the PCRA court denying Lambert relief on her PCRA petition.

January 17, 2001 Lambert's time for filing a petition for an allowance of an appeal of the Superior Court's order affirming the PCRA court with the Pennsylvania Supreme Court expires.

January 29, 2001 Lambert files her Third Amended Petition for a writ of *habeas corpus* in the district court.

March 9, 2001 The Supreme Court of the United States denies Lambert's petition for a writ of certiorari, appealing the decision of the Third Circuit.

May 21, 2001 Pursuant to an order of the district court, Lambert re-files her Third Amended Petition under a new docket number.

November 21, 2001 Judge Dalzell reinstates his findings and conclusions of law of April 21, 1997.

January 18, 2002 Judge Dalzell grants the respondents' fourth motion for his recusal.

February 6, 2002 Lambert's case is reassigned from Judge Dalzell to the docket of Judge Brody.

June 18, 2002 Following oral argument, Lambert's motion to apply the coordinate jurisdiction doctrine to the district court's prior rulings in this case is denied without prejudice to raise it at a later stage in the litigation.

January 17, 2003 Oral argument concerning all issues regarding the Commonwealth's Answer and Motion to Dismiss Lambert's petition.

I. FACTS AND PROCEDURAL HISTORY

_____ This case has a lengthy and complex factual and procedural history.³ In June of 1991, Laurie Show ("Show") became romantically involved with Lambert's boyfriend, Lawrence "Butch" Yunkin ("Yunkin"). Lambert was six months pregnant with Yunkin's child. Disturbed by Yunkin's new relationship with Show, Lambert accosted Laurie Show on several occasions.

³ Because most of the material facts are set forth in the Chronology, I will discuss them only briefly. Because a federal court owes deference to the factual findings of a state court under the AEDPA, the facts are compiled from the numerous state opinions in this case.

On December 20, 1991, Lambert and a friend, Tabitha Buck ("Buck"), planned to go to Laurie Show's condominium to assault her by cutting off her hair, in the hopes of teaching her a lesson. Yunkin drove them to Show's condominium. Hazel Show, Laurie's mother, had received a call the previous day from someone claiming to be Laurie's guidance counselor. The caller requested a conference with Hazel Show on the morning of December 20th. While she was gone, Laurie Show was brutally murdered.

Lambert and Buck were charged with criminal homicide and conspiracy to commit murder for the murder of Show. See East Lampeter Township Police Criminal Complaint No. 0000426-91. Buck was convicted of second degree murder in a jury trial. Yunkin was charged with hindering apprehension, a charge to which he pled guilty in exchange for his testimony against Lambert.⁴

On July 27, 1992, following a seven day bench trial, the Honorable Lawrence F. Stengel of the Lancaster County Court of Common Pleas found Lambert guilty of first degree murder and criminal conspiracy to commit murder. Roy D. Shirk, Esq. ("Shirk") represented Lambert during her trial. The trial court sentenced Lambert to life in prison.

On July 28, 1992, Lambert filed her first of two sets of post-verdict motions, raising various allegations of trial error and prosecutorial misconduct. The trial court denied Lambert's first set of post trial motions on July 19, 1994. Significantly, in reviewing Lambert's post-trial motion, the trial court found that Lambert's presence at Show's home and her participation in the attack on Show "by her own admission, would support a finding of criminal responsibility for the death of Laurie Show on an accomplice basis." Commonwealth of Pennsylvania v. Lambert, No. 0423-1992, at 14 (Pa. Com. Pl. July 19, 1994). Lambert did not appeal this order. On October 3, 1994, after obtaining new counsel, Lambert filed a second set of post-verdict motions for a new trial

⁴ Following Lambert's murder trial, the Commonwealth determined that Yunkin had perjured himself in breach of his plea agreement with the Commonwealth. Thus, the Commonwealth charged him with third degree murder to which he pleaded *nolo contendere*.

based on allegations of after-discovered evidence and ineffective assistance of trial counsel. On March 14, 1995, after two days of evidentiary hearings, Judge Lawrence F. Stengel denied Lambert's second set of post verdict motions.

In June of 1995, Lambert appealed the judgment of the sentence imposed by the Court of Common Pleas to the Pennsylvania Superior Court, based on essentially the same claims of ineffective assistance of counsel and after-discovered evidence, as were asserted in her post-verdict motions. On January 4, 1996, a three judge panel of the Pennsylvania Superior Court affirmed the judgment of Lambert's sentence by the Court of Common Pleas of Lancaster County.

On January 4, 1996 Lambert filed a petition for an allowance of an appeal (allocatur) with the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied Lambert's petition for allocatur on July 2, 1996. Lambert did not seek collateral review of any of her claims under the PCRA; nor did Lambert appeal the decision of the Pennsylvania Supreme Court denying her petition for an allowance of an appeal to the Supreme Court of the United States within ninety days as required by Rule 13(a) of the Rules of the Supreme Court of the United States.⁵ Lambert had until September 29, 1996 to file an appeal with the Supreme Court of the United States, but because the 29th was a Sunday, she had until Monday September 30, 1996 to file her appeal.

September 30, 1996 is an important date. It marks the date that "direct review" of Lambert's case became final. On November 17, 1995, the Pennsylvania General Assembly had amended section 9545 of the PCRA to provide in relevant part:

(b) Time for filing petition –

⁵ Rule 13(a) provides in relevant part: "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by a state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." SUP. CT. R. 13.

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petitioner alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim was predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that has been recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa. Cons. Stat. § 9545(b)(1)(i)-(iii), (2)-(4). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review."

§ 9545(b)(3). Because direct review of Lambert's claims became final on September 30, 1996, Lambert had until September 30, 1997 to file a petition for relief under the PCRA.

September 30, 1996 is also a significant date because it triggered Lambert's time for filing a federal *habeas corpus* petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 et. seq. The AEDPA

imposes a one year statute of limitations for filing a federal habeas petition.⁶ Section 2244(d)(1) provides that: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court." 28 U.S.C. § 2244(d)(1). There are, however, exceptions to § 2244(d)(1)'s one-year statute of limitations, including tolling. Thus, assuming that Lambert did not file a PCRA petition that would allow tolling of her time for filing her federal habeas petition under § 2254(d)(2), Lambert had until September 30, 1997 to file for federal habeas relief because her "judgment became final by the conclusion of direct review," on September 30, 1996. § 2244(d)(1)(A).

The AEDPA also requires a petitioner to exhaust state remedies before filing a federal habeas petition. Section 2254 provides in relevant part:

⁶ Section 2244(d)(1) establishes a one-year limitations period for the filing of petitions by state prisoners:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available state corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). The doctrine of "exhaustion of state remedies" requires that federal habeas petitioners adequately present their claims to the state courts *before* seeking relief in the federal courts. See Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982).

Lambert did not petition for relief under the PCRA. Instead, on September 12, 1996, Lambert filed a federal *habeas corpus* petition pro se in the United States District Court for the Eastern District of Pennsylvania. The case was assigned to the Honorable Stewart Dalzell. Judge Dalzell appointed present counsel to represent Lambert. On January 3, 1997, Lambert filed an amended petition, incorporating the claims previously presented to the state courts, but went further, stating the following grounds for relief:

(a) Lambert was actually innocent and no credible evidence supported the prosecution's theory of her guilt or the findings of the state trial court.

(b) the misconduct of the prosecution and the police created a situation of manifest injustice. The alleged misconduct included altering Lambert's statement to the police; creating a false crime scene photograph to discredit her; knowingly presenting perjured testimony and failing to take remedial measures after the perjury was confirmed; knowingly presenting "expert" testimony that was scientifically incredible while tampering with the defense's expert; altering evidence and witness statements; failing to disclose Brady and Giglio evidence; and losing other exculpatory evidence.

(c) after-discovered evidence created a situation of manifest injustice allegedly consisting of alterations of Lambert's statement; alteration of crime scene evidence; scientific testing of clothing worn by Yunkin; photographs of the crime scene which revealed additional writing in blood by the victim that exculpates Lambert; autopsy report notes revealing the time of the victim's death; injuries incurred by the "real" killers, Yunkin and Buck; testing of blood found on the

victim's ring; statements made by Yunkin and Buck to their friends; and, the subsequent admission by the prosecution that the primary witness – and one of the alleged real killers against Lambert had committed perjury at Lambert's trial; and

(d) trial counsel was ineffective in over 35 separate ways.

On February 12, 1997, the Commonwealth answered Lambert's petition arguing that because Lambert failed to exhaust her state court remedies, she had committed insurmountable procedural default. The Commonwealth also argued, in the alternative, that Lambert's petition should be denied on the merits. Finally, the Commonwealth explicitly stated that it was not waiving the exhaustion requirement.

Over the Commonwealth's objections to Lambert's petition on the grounds of exhaustion and procedural default, Judge Dalzell decided to permit broad discovery on Lambert's claims of actual innocence and prosecutorial misconduct, while, at the same time, considering the Commonwealth's arguments concerning exhaustion and procedural default.⁷ Also, over the Commonwealth's objection that it was improper, Judge Dalzell granted Lambert an evidentiary hearing on her claims.

Judge Dalzell commenced an evidentiary hearing on March 31, 1997. The hearing lasted for fourteen days after which Judge Dalzell declared Lambert "actually innocent" of the murder of Show, set aside Lambert's criminal conviction, released her from custody

⁷A federal judge may provide discovery under Rule 6 of the Rules Governing §2254 Cases, which provides: "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion, and for good cause shown grants leave to do so, but not otherwise." See 28 U.S.C. foll. §2254 Rule 6 & adv. comm. note (2003); Harris v. Nelson, 394 U.S. 286, 299, 89 S. Ct. 1082, 1090 (1969) ("Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); Bracey v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 1797 (1997); Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir. 1994) ("A district court sitting in habeas case retains the discretion to permit additional discovery if the petitioner presents 'good cause' to do so."); Jones v. Wood, 114 F.3d 1002, 1009 (9th Cir 1997) ("[D]iscovery is available to habeas petitioners at the discretion of the district court judge for good cause shown.").

and barred the Commonwealth from conducting a retrial of Lambert. See Lambert v. Blackwell, 962 F. Supp. 1521 (E.D. Pa. 1997).

Judge Dalzell concluded that Lambert exhausted all of the claims presented in her federal habeas proceeding, with the exception of the after-discovered evidence claim.⁸ Specifically, Judge Dalzell ruled that the 1995 amendment to the Pennsylvania Post Conviction Relief Act ("PCRA"), eliminating the waiver exception for actual innocence or procedural default (former sections 9543(a)(3)(ii) and (iii)), left Lambert without a state forum in which to pursue her claims. The district court interpreted the Pennsylvania legislature's elimination of the actual innocence and procedural default exceptions to waiver "as an advertent decision after the United States Supreme Court's decision in Schlup v. Delo, 513 U.S. 298, 130 L.Ed.2d 808, 115 S. Ct. 851 (1995) to place those issues squarely into the federal forum." Lambert, 962 F. Supp. at 1553. Having ruled that Lambert was "actually innocent" and that there was prosecutorial misconduct, Judge Dalzell did not address the third and fourth grounds raised in Lambert's habeas petition regarding after-discovered evidence and ineffective assistance of counsel. Id. at 1550.

Judge Dalzell also found that, to the extent that Lambert advanced claims that a Pennsylvania court might view as not being waived, the state proceedings would be ineffective to protect Lambert's rights if the district court dismissed the petition. See id. at 1554. Furthermore, the court found that, if it dismissed the petition as a "mixed petition" under Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198 (1982) (holding that a district court is required to dismiss a federal habeas petition filed under § 2254 if it contains both exhausted and unexhausted claims), "on the suspicion that perhaps its

⁸ Judge Dalzell found that the Commonwealth waived its exhaustion and procedural default arguments at the evidentiary hearing when counsel for the Commonwealth stated that relief was "warranted" in this case. N.T. at 2703, April 16, 1997. As the Third Circuit observed, and thereafter ruled, this concession was withdrawn by the Commonwealth the very next day. See Lambert v. Blackwell, 134 F.3d 506, 511 n.11 (3d Cir. 1998).

reading of the PCRA was wrong," then Lambert "would be deemed to have had her one bite at the federal apple," and thus would require the approval of the Third Circuit to return to federal court on a "second or successive application."⁹ 28 U.S.C. § 2244(b)(3)(D). Finally, the district court determined that in a case as "extraordinary" as Lambert's, "the principles of comity must give way to the imperative of correcting a fundamentally unjust incarceration." Id. at 1154. Thus, on April 21, 1997, the district court ordered Lambert released from custody.

On December 29, 1997, the Court of Appeals for the Third Circuit vacated the order of the district court granting Lambert's petition for a writ of habeas corpus and remanded the case to the district court with direction to dismiss the petition without prejudice.¹⁰ Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997). The Third Circuit decided that Lambert's federal habeas petition was a "mixed petition" because it contained both exhausted and unexhausted claims. Applying Rose, supra, the Third Circuit held that Lambert failed to exhaust her state remedies. See Lambert, 134 F.3d at 515. The interests of comity and justice, the Third Circuit ruled, would best be served by requiring complete exhaustion of Lambert's claims rather than considering the merits of Lambert's petition.¹¹ See id.

⁹ After Judge Dalzell issued his opinion, the Third Circuit decided Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997) (holding that "when a prior petition has been dismissed without prejudice for failure to exhaust state remedies, [authorization from the court] is [not] necessary and the petitioner may file his petition in the district courts as if it were the first such filing").

¹⁰ Because the Third Circuit found that the district court erred in reaching the issue of Lambert's actual innocence, it did not give any weight to Judge Dalzell's findings. See Lambert, 134 F.3d at 509 n.1.

¹¹ In so holding, the Third Circuit rejected Lambert's arguments that: (1) her failure to exhaust should be excused because of the "special circumstances rule" based on Supreme Court jurisprudence; see Granberry v. Greer, 481 U.S. 129, 107 S. Ct. 1671 (1987); Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509 (1952); (2) because she waived all her claims in state court, she had exhausted her state remedies; and (3) further state litigation would be "futile." Lambert, 134 F.3d 515-22.

On February 2, 1998, Lambert petitioned for relief under the PCRA in the Lancaster County Court of Common Pleas (the "PCRA court"). The Commonwealth did not challenge the timeliness of Lambert's PCRA petition, and the PCRA court did not rule on the issue. See Commonwealth of Pennsylvania v. Lambert, No. 0423-1992, 1998 WL 558749, at *1 (Pa. Com. Pl. 1998) (hereinafter the "PCRA Opinion"). The PCRA court began to hear testimony on April 30, 1998, and conducted eight weeks of hearings. After presenting 73 witnesses and offering the admission of 478 exhibits, Lambert rested her case on June 11, 1998. The Commonwealth presented 39 witnesses and offered the admission of 123 exhibits. The Commonwealth rested its case on June 22, 1998. The PCRA court heard a full day of closing arguments on June 24, 1998. The record of the PCRA proceedings consists of 8,000 pages of testimony and 601 exhibits. At the conclusion of the hearing, the PCRA court considered Lambert's 257 claims: 157 allegations of prosecutorial misconduct, including 66 allegations of Brady/Giglio violations, 72 allegations of after-discovered evidence, and 28 allegations of ineffective assistance of counsel.¹² See id. at *6.

The PCRA court issued its opinion on August 24, 1998. For the sake of its analysis, the PCRA court grouped Lambert's claims into twenty-one separate categories. See id. at *39-109. After an exhaustive analysis of Lambert's claims, the PCRA court found that "[t]here is no question" that "Lambert is not and never will be innocent of [the] crime." Id. at 136. Accordingly, the PCRA court denied Lambert's petition for relief under the PCRA.

Lambert appealed the decision of the PCRA court to the Pennsylvania Superior Court. The Pennsylvania Superior Court issued its opinion on December 18, 2000. See Commonwealth v. Lambert, 765 A.2d 306 (Pa. Super. 2000) (hereinafter the "Superior Court Opinion"). The Pennsylvania Superior Court raised sua sponte the issue of the

¹² Brady and Giglio violations are explained *infra*.

timeliness of Lambert's petition under the PCRA. Because Lambert did not file her PCRA petition until sixteen months after her conviction became final, the Pennsylvania Superior Court recognized that the petitioner did not satisfy the PCRA's time requirements. See id. at 322. The Pennsylvania Superior Court's discussion of the timeliness issue is noteworthy:

Appellant and her counsel were or should have been aware of the PCRA's jurisdictional time constraints. The amended statute went into effect nine months before Appellant's judgment of sentence became final. Appellant and her counsel had ample opportunity to bring Appellant's PCRA petition within the jurisdictional time limits. Instead, Appellant's counsel vigorously sought to remain in federal court arguing, *inter alia*, that Appellant's claims were procedurally barred in state court ... Based upon the dictates of the PCRA, Appellant has not satisfied the statute's time requirements, where her PCRA petition was not filed until sixteen months after he judgment of sentence became final. Thus, jurisdiction under the PCRA is lacking, unless Appellant's petition has alleged and Appellant has proved that one of the exceptions set forth in Section 9545(b)(1)(i)-(iii) applies ... Appellant has not carried her burden to save her otherwise untimely petition ... We recognize, however that the Third Circuit Court of Appeals, the PCRA court, the Commonwealth and counsel did not have the benefit of our Supreme Court's decision in [Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (1999)] when making their independent decisions and arguments in this case. No doubt, the collective position was that Appellant could rely on principles of comity and equitable tolling to overcome the PCRA time limitations. Thus, the PCRA court permitted counsel to defend Appellant's rights with zeal, bringing to the attention of the court all of the errors that, according to Appellant, caused her an unfair trial. The PCRA court allowed her to reiterate her claims and explore every avenue for relief. The PCRA court demonstrated remarkable patience and thoroughness throughout the proceedings, which provided for review on appeal over eight thousand pages of testimony from trial and the PCRA hearing, along with other filings, as well as the PCRA court's three hundred and twenty (320) page main opinion. Therefore, to preserve the state court findings, we will outline Appellant's arguments in sequence, and the PCRA court's disposition thereof....

Superior Court Opinion at 322-23. After analyzing the PCRA court's factual findings, the Pennsylvania Superior Court ruled that Lambert "has not met her burden under the PCRA statute. Accordingly, we affirm the PCRA court's order denying [Lambert] the collateral relief she requested." Superior Court Opinion at 362.

After the Pennsylvania Superior Court affirmed the PCRA court, Lambert did not petition the Pennsylvania Supreme Court for an allowance of an appeal. Under Pa.R.A.P. § 1113, Lambert had thirty days within which to file a petition for an allowance of an appeal of the Pennsylvania Superior Court's decision. Thus, Lambert's petition for appeal would have been due on January 17, 2001. In her briefs, Lambert explains that she did not appeal the decision of the Pennsylvania Superior Court to the Pennsylvania Supreme Court because during the pendency of Lambert's appeal to the Pennsylvania Superior Court, the Pennsylvania Supreme Court issued a *per curiam* order, Jud. Admin. Doc. No. 1 (May 9, 2000) ("Order No. 218"), which provides that:

AND NOW, this 9th day of May, 2000, we hereby recognize that the Superior Court of Pennsylvania reviews criminal as well as civil appeals, Further, review of a final order of the Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this court will be allowed only when there are special and important reasons therefor. Pa.R.A.P. 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal *habeas corpus* relief.

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been denied relief in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal *habeas corpus* relief. This Order shall be effective immediately.

Jud. Admin. Doc. No. 1 (May 9, 2000) ("Order No. 218").

In summary, under Order No. 218, the Pennsylvania Supreme Court has stated that when a claim of a petitioner has been denied by the Superior Court in a final order, a criminal defendant need not petition for a rehearing or an allowance of an appeal to be deemed to have exhausted his or her state remedies. Thus, Lambert did not petition the Pennsylvania Supreme Court for an allowance of an appeal because, in her view, Order No. 218 made review by the Pennsylvania Supreme Court unavailable.

On January 29, 2001, Lambert filed her Third Amended Petition for a Writ of Habeas Corpus in the federal district court.¹³ On November 21, 2001, Judge Dalzell, after denying a motion of the Commonwealth for his recusal in this case, and deciding that the factual findings of the PCRA court and the Pennsylvania Superior Court were not entitled to any deference because those courts were without jurisdiction to hear Lambert's petition, reinstated his findings of fact and conclusions of law from his earlier opinion. See Lambert v. Blackwell, 175 F. Supp. 2d 776, 791 (E.D. Pa. 2001).

On November 21, 2001, the Commonwealth filed a motion seeking Judge Dalzell's recusal from the case. After Judge Dalzell denied the Commonwealth's motion for his recusal, the Commonwealth sought review of Judge Dalzell's decision in the Third Circuit through a petition for a writ of mandamus. By order dated January 9, 2002, a panel of the Third Circuit offered Judge Dalzell the opportunity to respond to anything that the Commonwealth raised in its mandamus petition. On January 18, 2002, Judge Dalzell determined that "to continue to preside in this case will merely permit the Commonwealth to continue to change the subject from what really is at issue here." Lambert v. Blackwell, 205 F.R.D. 180, 182 (E.D. Pa. 2002). Thus, Judge Dalzell recused himself from Lambert's case.

The Lambert matter was transferred to my docket on February 6, 2002. On January 17, 2003, I held a hearing on the Commonwealth's motion to dismiss Lambert's petition for federal habeas relief under 28 U.S.C. § 2254.

II. DISCUSSION

A. The Antiterrorism and Effective Death Penalty Act of 1996

¹³ Lambert filed a Second Amended Petition for a Writ of Habeas Corpus in the federal court in March 1999. Because of the pendency both of Lambert's appeal in the Pennsylvania Superior Court and her petition for a writ of certiorari with the Supreme Court of the United States, Judge Dalzell took no action on this petition.

On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").¹⁴ As the Conference Committee report in part describes it, the AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. 104-518, 94th Cong., 2d Sess. (1996).

The significant changes to federal habeas practice instituted by the AEDPA reflects Congress' intent to bring change to the field. The AEDPA changed existing habeas practice in significant respects. For example, the AEDPA established a one year period of limitations for the filing of federal habeas petitions, amended the preexisting rules governing the exhaustion of state remedies, and prohibited successive habeas corpus petitions unless a United States Court of Appeals approves the filing. See 28 U.S.C. §§ 2244(d)(1), 2254(b)(2)-(3), 2244(b)(3).

While federal habeas law always incorporated concepts of comity into its jurisprudence, the AEDPA required increased deference by federal judges to state courts' factual findings and legal conclusions. Thus, under the AEDPA the federal court must uphold a state court ruling unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). My review of Lambert's petition takes place within the narrow boundaries of the discretionary powers of federal judges to determine whether *habeas corpus* relief is warranted.

B. The Timeliness of Lambert's Federal Habeas Petition

¹⁴ Because Lambert petitioned for a writ of *habeas corpus* after the effective date of the AEDPA, the provisions of the statute apply to her claims. See Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000); Lindh v. Murphy, 521 U.S. 320, 326-27 (1997).

Before a federal district court may even consider an application for a writ of habeas corpus, a petitioner must satisfy the AEDPA's stringent requirements governing the filing of a habeas petition. Again, section 2244(d)(1) establishes a one-year statute of limitations period for the filing of petitions by state prisoners:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

I must decide if Lambert's federal habeas petition of January 29, 2001 satisfies the requirements of § 2244(d)(1). The triggering date for measuring the AEDPA's one-year limitations period in Lambert's case is provided by § 2244(d)(1)(A): "the date on which Lambert's judgment became final by the conclusion of direct review or the expiration of time for seeking such review." Lambert's conviction became final within the meaning of § 2244(d)(1)(A) on September 30, 1996. Accordingly, Lambert's AEDPA limitations period began to run on September 30, 1996. Thus, Lambert's AEDPA limitations period would have expired one year later on September 30, 1997 unless tolled.

Lambert filed her original federal petition pro se on September 12, 1996 before the expiration of her time for seeking such review. She filed an amended counseled petition on January 3, 1997. Judge Dalzell granted Lambert's habeas relief on April 21, 1997 and immediately released her from custody.¹⁵ The Commonwealth appealed the granting of the writ, and on December 29, 1997, the Third Circuit vacated Judge Dalzell's findings and his order granting Lambert relief. On February 3, 1998, Judge Dalzell dismissed without prejudice Lambert's mixed petition based on her failure to exhaust state remedies. Lambert then filed her petition for PCRA relief with the state court on February 2, 1998.¹⁶ The Pennsylvania Superior Court ruled on Lambert's PCRA petition on December 18, 2000. On January 29, 2001, Lambert filed her "Third Amended Habeas Petition" almost four years after the date on which her limitation period expired on September 30, 1997.¹⁷ Because Lambert did not file her federal habeas petition until January 29, 2001, she failed to satisfy § 2244(d)(1)'s one-year filing requirement. Thus, I am required to dismiss Lambert's petition as untimely unless the § 2254(d)(1) limitation period is tolled. For the reasons that follow, I conclude that both equitable and statutory tolling apply to Lambert's federal habeas petition. As a result, I find that Lambert's federal habeas petition is timely filed under the AEDPA.

¹⁵ When Judge Dalzell released Lambert from custody, 262 days had expired on her time for filing a federal habeas petition. See § 2254(d)(1).

¹⁶ Lambert filed her PCRA petition on February 2, 1998 in anticipation of her imminent return to custody. But because Lambert did not return to custody until February 4, 1998, I consider February 4, 1998 the effective filing date of Lambert's PCRA petition. For purposes of the tolling calculation, this discrepancy is immaterial.

¹⁷ Judge Dalzell never took action on Lambert's Second Amended Petition. Lambert re-filed her "Third Amended Petition" under a new docket number on May 21, 2001. When a habeas petition is dismissed without prejudice, the petition will be treated as if it never existed; if a petition is dismissed for failure to exhaust state remedies, a subsequent petition filed after exhaustion cannot be considered an amendment to the prior petition, but must be considered a new action. See Jones v. Morton, 195 F.3d 153, 160-61 (3d Cir. 1999). Because Judge Dalzell dismissed Lambert's original petition of September 12, 1996 without prejudice for failure to exhaust, what Lambert has termed her "Third Amended Petition" is really her first petition.

1. Period of Equitable Tolling

The law of the Third Circuit provides that the limitations provision of the AEDPA is not jurisdictional in nature. Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 617-18 (3d Cir. 1998). Thus, the limitations period may be subject to equitable modifications such as tolling. Id. The unique facts of this case support the equitable tolling of the limitation period of § 2244(d)(1) for the period between April 21, 1997, the day Lambert was released from prison, and February 4, 1998, the day she returned to custody.

The law permits equitable tolling only in extraordinary circumstances. See Johnson v. Hendricks, 314 F.3d 159, 162 (3d Cir. 2002); Jones v. Morton, 195 F.3d 153 (3d Cir. 1999); Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616 (3d Cir. 1998). As the Third Circuit observed in Miller, "equitable tolling is proper only when the 'principles of equity would make the rigid application of a limitation period unfair.'" Miller, 145 F.3d at 618 (quoting Shendock v. Director, Office of Workers' Comp. Programs, 893 F.2d 1458, 1462 (3d Cir. 1990) (en banc)). This "unfairness" generally occurs when the petitioner has been prevented from asserting his or her rights in some extraordinary way. Id. A petitioner must demonstrate that he or she has "exercised reasonable diligence in investigating and bringing [the] claims..." Id. In other cases, the Third Circuit has explained that equitable tolling "may be appropriate if (1) the defendant has actively misled the plaintiff; (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." Jones, 195 F.3d at 159 (quoting United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)).

The Third Circuit implicitly permits equitable tolling in non-capital cases that do not involve attorney error, miscalculation, inadequate research, or other mistakes. See Johnson 314 F.3d at 163; Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001) ("[i]n

non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary circumstances' required for equitable tolling") (citation omitted)); Jones 195 F.3d at 159. This case does not involve attorney error, miscalculation, inadequate research, or those other mistakes typically rejected as grounds for the application of equitable tolling in non-capital cases. See id. However, Lambert has, "in some extraordinary way," been prevented from asserting her rights. Midgley, 142 F.3d at 179. Rigid application of § 2244(d)(1)'s one-year filing requirement to Lambert's case would be unfair.

After Judge Dalzell granted Lambert habeas relief, setting aside her conviction and releasing her from custody, Lambert was not eligible to petition for PCRA relief. Section 9543 of the PCRA specifies the criteria for determining whether a petitioner is eligible for relief. It provides in relevant part:

(a) General rule – To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime

§ 9543. A PCRA petitioner must be "convicted" of a crime. Id.

The purpose of a § 2254 habeas motion is "to invalidate the state court's judgment of conviction." Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001); see also Commonwealth v. Thomas, 370 Pa. Super. 544, 548, 537 A.2d 9, 11 (Pa. Super. 1988) (recognizing that when a federal court grants habeas relief, the effect is to vacate the state conviction). On April 21, 1997, Judge Dalzell vacated Lambert's state conviction and released her from custody. Thus, as of that date, Lambert was no longer "convicted of a crime" and was ineligible to file a PCRA petition that could have tolled § 2244(d)(1)'s

one-year filing requirement. Lambert continued in this status until she was returned to prison on February 4, 1998. The application of equitable tolling is appropriate under these unique circumstances to prevent the unfairness that would result through rigid application of § 2244(d)(1)'s one-year filing requirement to Lambert's petition.¹⁸ See Valverde v. Stinson, 224 F.3d 129 (2d Cir. 2000) (applying equitable tolling to the case of a non-capital petitioner because a corrections officer confiscated the petitioner's legal papers).

I conclude that Lambert's federal habeas petition was equitably tolled from April 21, 1997, the date Judge Dalzell released Lambert from custody, until February 4, 1998, the date Lambert returned to prison and filed her PCRA petition. When Judge Dalzell released Lambert from custody on April 21, 1997, 262 days had expired on her time for filing a federal habeas petition and 163 days remained on Lambert's time for filing a federal habeas petition. Because I find that the period from April 21, 1997 until February 4, 1998 is equitably tolled, it is excluded in calculating Lambert's time for filing her federal habeas petition. Thus, on February 4, 1998, 163 days continued to remain on Lambert's time for filing a federal habeas petition.

2. Period of Statutory Tolling

Section 2244(d)(2) provides that: "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of

¹⁸ The Commonwealth argues that Lambert's failure to file a timely federal habeas petition is attributable to her "deliberate bypass" of state court review. In other words, because Lambert could have filed a PCRA petition that would have tolled the application of § 2244(d)(1) but instead chose to file a federal habeas petition in the district court, she must now accept the consequence that her time for filing a habeas petition has expired. This argument misses the point. When Lambert was set free, she still had 163 days in which to file a PCRA petition that would have tolled § 2244(d)(1). Thus, the Commonwealth ignores that, if Judge Dalzell had dismissed Lambert's federal habeas petition, she could have still filed a PCRA petition that would toll § 2244(d)(1).

limitation under this subsection." § 2244(d)(2). Thus, a "properly filed" application for State post-conviction relief or other collateral review "tolls" § 2244(d)(1)'s one-year limitations period for the time during which the application is "pending." see Jones, 195 F.3d at 158 (explaining that § 2244(d)(2) provides for statutory tolling of § 2244(d)(1)). For the reasons that follow, I conclude that when Lambert filed her PCRA petition on February 4, 1998 it was a "properly filed" petition. § 2244(d)(2). In turn, when Lambert "properly filed" her PCRA petition on February 4, 1998, it triggered the application of § 2244(d)(2), further tolling Lambert's time for filing her federal habeas petition.¹⁹ See id.

The standard for what constitutes a "properly filed" application is determined by federal law. In Artuz v. Bennett, 531 U.S. 4 (2000), the Supreme Court held that: [A]n application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

Id. at 8 (footnote omitted). In Artuz, the Court distinguished between such "conditions to filing," to which a state application must adhere in order to be properly filed, and a state's "conditions to obtaining relief," with which an application need not comply for purposes of § 2244(d)(2): "[I]n common usage, the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." Id. at 9; see also Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998) ("a properly filed application' is one

¹⁹ Lambert did not toll the AEDPA's one-year filing requirement by filing her federal petition on September 12, 1996. In Duncan v. Walker, 533 U.S. 167 (2001), the Supreme Court ruled that an application for federal habeas review is not "an application for State post-conviction review or other collateral relief" within the meaning of § 2244(d)(2). A federal habeas petition, therefore, cannot toll a prisoner's limitation period under § 2244(d)(2). See id. at 181-82.

submitted according to the state's procedural requirements, such as the rules governing the time and place of filing").

In 1995, the Pennsylvania General Assembly amended the PCRA to provide that: "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final...." § 9545(b)(1).²⁰ Lambert's time for filing her PCRA petition expired on September 30, 1997. She filed her PCRA petition on February 4, 1998. Because Lambert did not file her PCRA application until February 4, 1998 she did not comply with Pennsylvania's one-year filing requirement for PCRA petitions. See § 9545(b)(1). I conclude, however, that although Lambert did not file her petition within the one-year period, her petition was nevertheless "properly filed" for purposes of the AEDPA.

Artuz left open the question of how a lower court was to proceed in determining under federal law whether a state petition was "properly filed." In Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), the Third Circuit addressed the issue whether the Pennsylvania Supreme Court's ruling that Fahy's fourth PCRA petition was untimely under § 9545 was "properly filed" under § 2244(d)(2). Fahy was convicted of first degree murder in Pennsylvania and sentenced to death in 1983. After failing to obtain post-conviction relief with his first three state petitions, Fahy filed a fourth PCRA petition on November 12, 1997. The PCRA court dismissed Fahy's petition, in part, on the ground that it was time-barred under § 9545(b)(1). The Pennsylvania Supreme Court affirmed, finding that Fahy's petition was untimely under § 9545(b)(1) because it was filed more than a year

²⁰ In Lovasz, the Third Circuit expressly identified § 9545(b)(1) as an example of a procedural requirement to which a state petition must adhere:

A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of court in which he was sentenced, Pa.R.Crim.P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons. Stat. § 9545(b)(1).

Lovasz, 134 F.3d at 148.

after his judgment became final. See Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214, 218-220 (Pa. 1999).

Addressing the issue whether Fahy properly filed his PCRA petition, the Third Circuit explained that:
the AEDPA explicitly directs us to toll the statute of limitations only when a collateral petition for state relief was ‘submitted according to the state’s procedural requirements, such as the rules governing the timing and place of filing.’ (citation omitted). Therefore, to apply this statute as a matter of federal law we must look to state law governing when a petition for collateral relief is properly filed. The AEDPA requires us to interpret state law as we do when sitting in diversity cases, and therefore we must defer to a state’s highest court when it rules on an issue. Here the Pennsylvania Supreme Court has specifically ruled that Fahy’s PCRA petition was not properly filed as a matter of state law...Fahy’s petition was therefore not statutorily tolled because his PCRA petition was not properly filed.

Fahy, 240 F.3d at 243-44 (emphasis added). The Third Circuit noted that "the AEDPA requires us to interpret state law as we do when sitting in diversity cases" in which federal courts apply the state law that a state court hearing the case would apply. Id. The Third Circuit also recognized, however, that the Pennsylvania Supreme Court had "specifically ruled" that Fahy’s PCRA petition was not timely filed as a matter of state law and that the Pennsylvania Supreme Court dismissed Fahy’s petition. See id.; see also Brown v. Shannon, No. 01-1308, 2003 WL 1215520, at *5 n.5, (3d Cir. March 17, 2003).

In determining whether Lambert’s petition was properly filed, I follow the approach staked out by the Third Circuit in Fahy and Brown and examine how the Pennsylvania Superior Court treated Lambert’s PCRA petition. The Pennsylvania Superior Court was the highest Pennsylvania court to consider Lambert’s PCRA petition. The Pennsylvania Superior Court recognized that Lambert did not satisfy § 9545(b)(1)’s one-year filing requirement, which the court explained was jurisdictional. Unlike the Fahy court, however, the Pennsylvania Superior Court did not dismiss Lambert’s petition

as untimely but accepted jurisdiction to "preserve the findings" of the PCRA court.²¹ Superior Court Opinion at 322-23. It then proceeded to review the merits of Lambert's claims and affirmed the decision of the PCRA court denying Lambert relief.²² See id. The Pennsylvania Superior Court did not simply reiterate the findings of the PCRA court, but also reviewed Lambert's claims of errors by the PCRA court and made its own determinations that these claims were without merit. See id. at 354-362. Despite the Pennsylvania Superior Court's observation that Lambert failed to timely file, it considered the merits of Lambert's appeal of the PCRA decision, rendered a lengthy opinion and affirmed the PCRA court in all respects. See id. at 363 ("Based upon the foregoing, we hold that [Lambert] has not met her burden under the PCRA statute. Accordingly, we affirm the PCRA court's order denying [Lambert] the collateral relief she requested").²³

²¹ A federal habeas court lacks authority to review a state court's determination that it has jurisdiction based on state law. A state court's determination of jurisdiction based on that state's law is binding on a federal court. Poe v. Caspari, 39 F.3d 204, 207 (8th Cir. 1994) (stating that "[j]urisdiction is no exception to the general rule that federal courts will not engage in collateral review of state court decisions based on state law"); Wright v. Angelone, 151 F.3d 151, 158 (4th Cir. 1998) (finding that the state court's determination of its jurisdiction was a matter of state law not reviewable by a federal habeas court); Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir. 1976) (stating that the "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary"). "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." Wainwright v. Goode, 464 U.S. 78, 83, 104 S. Ct. 378 (1983). Thus, this court will not engage in collateral review of the Pennsylvania Superior Court's determination that it had jurisdiction to review Lambert's appeal of the PCRA court's decision denying her relief.

²² Lambert challenged neither the PCRA court decision nor the Superior Court decision on the grounds that these courts lacked jurisdiction over her petition under § 9545(b)(1).

²³ In Carey v. Saffold, 536 U.S. 214, 122 S. Ct. 2134 (2002), the United States Supreme Court stated that "[t]here are many plausible answers" to the question of how a state court could find that a state petition is filed too late and still consider the petition on the merits, "for instance where the merits present no difficult issue." Id. at 2141 (reviewing the decision of the Court of Appeals for the Ninth Circuit that petitioner's state application was timely under the AEDPA because the California Supreme Court in a

In order to conclude that Lambert's petition was not properly filed because it was untimely under § 9545(b)(1), I would have to conclude that the highest state court to consider the matter accepted jurisdiction, heard the case, wrote a lengthy opinion reviewing the findings of the PCRA court, made legal determinations of its own regarding the proceedings before the PCRA court, and affirmed the PCRA court, all on a petition that was not "properly filed." Such a conclusion would be inconsistent with the Third Circuit's approach in Fahy. Because of the Pennsylvania Superior Court's treatment of Lambert's petition in light of Pennsylvania law, as well as the principle of comity that informs federal habeas review, I find that Lambert "properly filed" her PCRA petition on February 4, 1998.

There is an alternative argument that could support the conclusion that Lambert properly filed her PCRA petition on February 4, 1998. In Artuz, the United States Supreme Court stated in a footnote that "[w]e express no view on the question whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." Artuz, 531 U.S. at 9 n.2 (citing Smith v. Ward, 209 F.3d 383, 385 (5th Cir. 2000)). On March 17, 2003, in an opinion by

single sentence denied the petition "on the merits," even though it also determined that the petition was four and a half months too late under its "general reasonableness" time standard for the filing of appeals.) The California Supreme Court did not clearly address whether petitioner Saffold's four and a half month delay in filing an appeal was "unreasonable," and thus the United States Supreme Court remanded the case to the Ninth Circuit. See id. The case before me is different than Carey in many respects. The PCRA court did not even address the issue of the timeliness of Lambert's petition. The Pennsylvania Superior Court did not dismiss Lambert's petition as untimely, but rather specifically determined that it had jurisdiction to preserve the findings of the PCRA court; it even reviewed claims not raised by Lambert before the PCRA court.

Chief Judge Becker, the Third Circuit suggested that this issue remains open. See Brown, 2003 WL 1215520, at *5 n.5. In Brown, the Third Circuit stated in a footnote that:
We would note...that two of our sister courts have held that an untimely petition for state post-conviction relief may be deemed 'properly filed' if the state's statute of limitations contains exceptions that require the state court to examine the merits of the petition to determine whether any of the exceptions apply before dismissing it as untimely.

Id. (citing Dictado v. Ducharme, 244 F.3d 724, 727-28 (9th Cir. 2001); Smith v. Ward, 209 F.3d 383, 385 (5th Cir. 2000)). In other words, if a state court is required to examine the merits of a petition to determine whether an exception to that state's statute of limitations applies, the petition may be deemed "properly filed" by a federal court for the purposes of the AEDPA. See id.

If it were adopted by the Third Circuit, the approach of the Court of Appeals for the Fifth Circuit in Smith would support an alternative basis for deciding that Lambert properly filed her PCRA petition. In Smith, the Fifth Circuit held that Smith's federal habeas petition could be deemed "properly filed" under federal law although the Louisiana state courts ruled that his state application was time-barred. See Smith, 209 F.3d at 385. Smith's state application was dismissed pursuant to La. Code Crim. P. art. 930.8A, which imposes a three-year time limit for filing a state application for relief. It also provides that a Louisiana court may "accept a prisoner's application for filing and review it to determine whether any of [its] exceptions to untimely filing are applicable." Id. Because article 930.8A contains exceptions that, if at issue, require a Louisiana state court to determine whether any of the exceptions apply before dismissing it as untimely, the statute "does *not* impose an absolute bar to filing." Id. Thus, "Smith's state application, although ultimately determined by the state court to be time-barred, nevertheless was 'properly filed' within the meaning of § 2244(d)(2)." Id.

In its opinion ordering Judge Dalzell to dismiss Lambert's federal habeas petition, the Third Circuit stated that Lambert's PCRA petition might be timely filed through

application of § 9545(b)(1)(i)'s exception to § 9545(b)(1)'s one-year filing requirement. See Lambert, 134 F.3d at 523-24. The exception provides that:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or Constitution or laws of the United States.

§ 9545(b)(1)-(1)(i). When a government official interferes with the presentation of a petitioner's PCRA petition "in violation of the Constitution or laws of the Commonwealth of Pennsylvania or Constitution or laws of the United States," a PCRA petition will not be untimely under § 9545(b)(1).

Following the Third Circuit's suggestion in Brown, I conclude that Lambert's PCRA petition could also be "properly filed" because the Pennsylvania Superior Court was required to address whether Lambert could satisfy § 9545(b)(1)(i)'s "interference by government officials" exception to § 9545(b)(1)'s one-year filing requirement. As the Third Circuit held, Judge Dalzell should have dismissed Lambert's petition for failure to exhaust her state remedies. By setting aside Lambert's conviction and releasing her from custody on April 21, 1997, Judge Dalzell created an issue whether Lambert was eligible to file a petition for PCRA relief under § 9545(b)(1)(i)'s "interference by government officials" exception to § 9545(b)(1)'s one-year filing requirement. In dismissing Lambert's petition, the Third Circuit recognized that Lambert's case might fall within this exception. The Pennsylvania Superior Court determined that it was necessary to examine whether Judge Dalzell's retention of Lambert's case constituted interference by a government official that excused her untimely PCRA petition under §

9545(b)(1)(i).²⁴ Thus, if the Third Circuit were to follow the Fifth Circuit's approach in Smith, I would find that Lambert properly filed her PCRA petition on February 4, 1998 for the additional reason that the Pennsylvania Superior Court deemed it necessary to determine whether Lambert timely filed her PCRA petition under § 9545(b)(1)(i)'s exception to § 9545(b)(1).

Having determined that Lambert "properly filed" her PCRA petition, I next must decide the length of time during which it was "pending" in order to calculate the tolling period under § 2244(d)(2). Under § 2244(d)(2), the AEDPA's limitations period is tolled during the period of time that a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In Swartz v. Meyers, 204 F.3d 417 (3d Cir. 2000), the Third Circuit considered the time period during which a state petition is "pending" and held that: (1) the AEDPA's statute of limitations is tolled "during the time between a court's ruling and

²⁴ In addressing this issue, the Pennsylvania Superior Court stated that:

[A]ny suggestion that the federal district court's reasoned decision to retain the case constituted "interference by government officials" is without merit.... When the Commonwealth filed an appeal on April 22, 1997, Appellant's counsel was on clear notice that the district court's decision might be reversed and the case remanded for dismissal on the ground of nonexhaustion of state remedies. Counsel still had five months to preserve review under the PCRA, particularly where counsel now had the benefit of federal proceedings. Therefore, we cannot accept any suggestion that the federal district court's "premature" retention of the case adequately excuses Appellant's delay in filing a PCRA.

Superior Court Opinion at 322. The Pennsylvania Superior Court's analysis ignores a crucial consideration, namely that during the five months following her release from custody, Lambert was ineligible to file a PCRA petition because Judge Dalzell vacated her conviction and released her from custody. Even though Lambert may have been on notice that the Commonwealth was appealing her case on grounds that she failed to exhaust her state remedies, Lambert was not eligible for PCRA relief because she was no longer a convict nor under the duress of punishment. Thus, Judge Dalzell's premature retention of the case did, in fact, constitute interference by a government official that also could have excused Lambert's untimely PCRA petition. This determination by the Pennsylvania Superior Court is, of course, irrelevant in deciding whether Lambert's PCRA petition is properly filed in light of the Third Circuit's footnote in Brown.

the timely filing of an appeal or request for allowance of appeal," and (2) "pending" includes the time for seeking an allowance of appeal to the Pennsylvania Supreme Court, whether or not an allowance of appeal is sought. *Id.* at 420-21. In Stokes v. District Attorney of the County of Philadelphia, 247 F.3d 539, 542-43 (3d Cir. 2001), the Third Circuit ruled that the time during which a petitioner may seek certiorari in the United States Supreme Court does not toll AEDPA's limitations period under § 2244(d)(2) when the petitioner does not, in fact, file a petition for writ of certiorari. *See also Miller v. Dragovich*, 311 F.3d 574, 578 (3d Cir. 2002).

Lambert's petition was pending from February 4, 1998, the date on which she filed her PCRA petition in the Court of Common Pleas, until January 17, 2001. January 17, 2001 was the the date on which Lambert's time for filing an allowance of an appeal from the adverse ruling of the Pennsylvania Superior Court with the Pennsylvania Supreme Court expired. On February 4, 1998, Lambert had 163 days within which to file her federal habeas petition. Lambert's PCRA petition was pending until January 17, 2001. This means that on January 17, 2001, Lambert still had 163 days within which to file her federal habeas petition. Lambert filed her federal habeas petition on January 29, 2001 within twelve days of the expiration of her time for seeking an allowance of an appeal with the Pennsylvania Supreme Court and therefore well within the 163 day period. Thus, Lambert timely filed her federal habeas petition under the AEDPA on January 29, 2001.²⁵

²⁵ The Commonwealth argues that I should not apply, as I have, a combination of equitable and statutory tolling to Lambert's PCRA petition. Instead, it argues that Lambert's petition can be tolled on the basis of statutory tolling alone. Lambert's petition is timely under § 2244(d)(1) because her PCRA petition of February 2, 1998 "statutorily tolled" § 2244(d)(1)'s one year filing requirement. Resp. Reply Mem. at 7. The first step in the Commonwealth's analysis is that § 2244(d)(1)'s requirement that the one-year limitation period applies to applications "by a person in custody pursuant to a judgment in state court." § 2244(d)(1) (emphasis added). When Lambert was released from custody on April 21, 1997, she became ineligible to file an application for a writ of *habeas corpus* under § 2244(d)(1). *See id.* More importantly, she became ineligible to

C. Exhaustion

1. Requirements of Exhaustion

Having determined that Lambert's federal petition of January 29, 2001 is not time-barred under the AEDPA and therefore I can consider the petition, I next must decide whether to reach the merits of the claims contained in the petition. Before a federal court may reach the merits of a claim in a timely filed § 2254 petition, each claim (1) must have been exhausted in state court, and (2) not procedurally defaulted. See 28 U.S.C. § 2254(b)(1)(A); Rose v. Lundy, 455 U.S. 509, 522 (1982); Coleman v. Thompson, 501 U.S. 722, 731-32 (1991).

The purpose of the exhaustion requirement is to afford state courts, as a matter of comity, a full and fair opportunity to address federal claims. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (holding that discretionary review by a state's highest court is an available procedure for purposes of exhaustion, so that the failure to present the claim in a petition for discretionary review constitutes a failure to exhaust the claim). To satisfy the exhaustion requirement on a claim, a petitioner must demonstrate that he or she

apply for relief under the PCRA; the consequence of this is that she could not "statutorily toll" the application of § 2244(d)(1) by properly filing a PCRA petition under § 9545(b)(1). See § 2244(d)(2).

The next step in the Commonwealth's argument is that Lambert became eligible to file for federal habeas relief and PCRA relief upon her return to custody on February 4, 1998. In other words, because Lambert again became "a person in custody" for the purposes of § 2244(d)(1), she again became eligible for federal habeas relief. At this point, according to the Commonwealth's argument, Lambert still had 163 days within which to file properly a PCRA petition that would trigger the application of § 2244(d)(2), thus tolling § 2244(d)(1). On February 2, 1998, in anticipation of her imminent return to custody, Lambert filed a PCRA petition, renewing the possibility that she had a properly filed petition. Her petition was pending until January 17, 2001. Thus, the Commonwealth argues that Lambert timely filed her January 29, 2001 federal petition.

While creative, the Commonwealth's argument misconstrues § 2244(d)(1). Section 2244(d)(1) specifies a time limit that is tied to various triggering dates. It does not, as the Commonwealth assumes, specify just any 365 day period in which an applicant may be in custody. Rather, once in custody an applicant has one year to file an application for a writ of *habeas corpus* that runs from the latest of the triggering dates specified under § 2244(d)(1)(A)-(D).

"fairly presented" that claim in the federal petition to each level of the state courts, including the highest state court in which the petitioner was entitled to review. See id. at 845-48; Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000) ("The burden of establishing that such claims were fairly presented falls upon the petitioner"). To "fairly present" a claim, a petitioner must present the factual and legal substance of the claim to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999); see also Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996) ("The petitioner's state court pleadings and briefs must demonstrate that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are 'substantially equivalent' to those asserted in federal courts"). However, the state courts need not reach the merits of a claim for it to be properly exhausted; exhaustion requires only that a federal habeas petitioner afford the state courts the *opportunity* to consider a claim on its merits. See Castille v. Peoples, 489 U.S. 346, 350-51 (1989).

Lambert's federal petition of January 29, 2001 advances four claims for relief which depend on hundreds of factual claims. A comparison of Lambert's federal petition and the PCRA court's discussion of her claims suggests that Lambert presented all of the claims in her federal petition of January 29, 2001 to the PCRA court.²⁶ Lambert

²⁶ Again, Lambert's counseled federal habeas petition of January 3, 1997 advanced the following grounds for relief:

(a) Lambert was actually innocent and no credible evidence supported the prosecution's theory of her guilt or the findings of the state trial court.

(b) the misconduct of the prosecution and the police created a situation of manifest injustice. The alleged misconduct included altering Lambert's statement to the police; creating a false crime scene photograph to discredit her; knowingly presenting perjured testimony and failing to take remedial measures after the perjury was confirmed; knowingly presenting "expert" testimony that was scientifically incredible while tampering with the defense's expert; altering evidence and witness statements; failing to disclose Brady and Giglio evidence; and losing other exculpatory evidence.

confirms this, stating that "all of the claims were presented to the state court in the...PCRA proceedings." Petitioner's Resp. to Resp'ts Mot. to Dismiss at 14. In her PCRA petition and now before me, Lambert argues that her conviction and sentence are wrongful on the basis of after-discovered evidence. She argues that this after-discovered evidence establishes her credibility and innocence. She also claims that intentional acts of prosecutorial misconduct, falsification of evidence, witness tampering, discovery violations, perjured testimony and ineffective assistance of trial and appellate counsel supported her wrongful conviction.

2. Order No. 218 of the Pennsylvania Supreme Court

To satisfy the exhaustion requirement, Lambert must have "fairly presented" the claims in her January 29, 2001 petition to the state courts, including the highest state court in which she was entitled to review. The Commonwealth argues that Lambert failed

(c) after-discovered evidence created a situation of manifest injustice allegedly consisting of alterations of Lambert's statement; alteration of crime scene evidence; scientific testing of clothing worn by Yunkin; photographs of the crime scene which revealed additional writing in blood by the victim that exculpates Lambert; autopsy report notes revealing the time of the victim's death; injuries incurred by the "real" killers, Yunkin and Buck; testing of blood found on the victim's ring; statements made by Yunkin and Buck to their friends; and, the subsequent admission by the prosecution that the primary witness – and one of the alleged real killers against Lambert had committed perjury at Lambert's trial; and

(d) trial counsel was ineffective in over 35 separate ways.

Judge Dalzell afforded both Lambert and the Commonwealth discovery which broadened the factual basis of Lambert's claims. Lambert's subsequent PCRA petition thus benefitted from the results of the discovery provided to her by the district court. Lambert's PCRA petition stated the same claims as her original federal habeas petition. Her present federal petition of January 29, 2001 states the same claims and, again, reflects the benefit of the discovery previously provided to her by the district court. Lambert's supplement to her petition also includes claims of bias on the part of the PCRA court. Obviously, these were not presented to the PCRA court. But, they were addressed by the Pennsylvania Superior Court.

to exhaust her state remedies because she did not present her claims to the Pennsylvania Supreme Court. After the Pennsylvania Superior Court denied Lambert's appeal of the PCRA court's decision denying her relief, Lambert had thirty days within which to petition the Pennsylvania Supreme Court for an allowance of appeal. See Pa.R.A.P. § 1113(a).²⁷ Lambert never filed a petition for an allowance of an appeal of the Pennsylvania Superior Court's denial of her PCRA petition with the Pennsylvania Supreme Court. Thus, the Commonwealth argues that, with the exception of her claims for ineffective assistance of counsel which were presented to the Pennsylvania Supreme Court on direct review, Lambert failed to exhaust her state remedies. In response, Lambert argues that she exhausted all of her claims pursuant to Order No. 218 of the Pennsylvania Supreme Court.

During the pendency of Lambert's appeal in the Pennsylvania Superior Court, the Pennsylvania Supreme Court issued Order No. 218 which provides:

AND NOW, this 9th day of May, 2000, we hereby recognize that the Pennsylvania Superior Court of Pennsylvania reviews criminal as well as civil appeals. Further, review of a final order of the Pennsylvania Superior Court is not a matter of right, but of sound judicial discretion, and an appeal to this court will be allowed only when there are special and important reasons therefor. Pa.R.A.P. § 1114. Further, we hereby recognize that criminal and post-conviction relief litigants have petitioned and do routinely petition this Court for allowance of appeal upon Superior Court's denial of relief in order to exhaust all available state remedies for purposes of federal *habeas corpus* relief.

In recognition of the above, we hereby declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Pennsylvania Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been denied relief in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal *habeas corpus* relief. This Order shall be effective immediately.

²⁷ This time for filing a petition for allowance of an appeal may be extended if a timely application for reargument is filed in the Pennsylvania Superior Court or Commonwealth Court by any party. See Pa.R.A.P. § 1113(a). Neither the Commonwealth nor Lambert petitioned the courts for reargument.

As other courts in this circuit have noted, Justice Souter's concurring opinion in O'Sullivan likely provided the impetus for this Order. See Mattis v. Vaughn, 128 F. Supp. 2d 249, 256 (E.D. Pa. 2001); Blasi v. Attorney General, 120 F. Supp. 2d 451, 465-66 (M.D. Pa. 2000). In that opinion, Justice Souter stated that he understood O'Sullivan "to have left open the question ... whether [the Court] should construe the exhaustion doctrine to force a State, in effect, to rule on discretionary review applications when the State has made it plain that it does not wish to require such applications before its petitioners may seek federal habeas relief." O'Sullivan, 526 U.S. at 849. Order No. 218 is similar to the order issued by the Supreme Court of South Carolina to which Justice Souter referred as an example of a way in which a State may make discretionary review "unavailable" or take it "outside the standard review process" for exhaustion purposes. In light of O'Sullivan, Lambert interprets the Pennsylvania Supreme Court's Order No. 218 to mean that she exhausted her claims by raising them before the PCRA court and the Pennsylvania Superior Court and that her failure to fairly present her claims to the Pennsylvania Supreme Court is immaterial for exhaustion purposes.

Lambert is correct on this issue. The lower federal courts owe great deference to dictum of the United States Supreme Court, such as Justice Souter's concurrence in O'Sullivan, because the United States Supreme Court uses dictum to provide guidance to lower courts and to provide instruction regarding issues it cannot decide. See In re McDonald, 205 F.3d 606, 612-13 (3d Cir. 2000); Alston v. Redman, 34 F.3d 1237, 1247 (3d Cir. 1994), cert. denied, 513 U.S. 1160 (1995). Also, while the courts in this circuit have expressed some doubt as to the validity of Order No. 218, they have held that, by removing from the standard review process discretionary review before the Pennsylvania Supreme Court, Order No. 218 makes such review "unavailable" in Pennsylvania for

exhaustion purposes.²⁸ See Mattis, 128 F. Supp. 2d at 259; Blasi, 120 F. Supp. 2d at 469. The decision of the Court of Appeals for the Ninth Circuit in Swoopes v. Sublett, 196 F.3d 1008 (9th Cir. 1999) (per curiam), cert. denied, 529 U.S. 1124 (2000) persuaded the courts in Mattis and Blasi to find that Order No. 218 makes discretionary review by the Pennsylvania Supreme Court "unavailable." On remand from the Supreme Court for further consideration in light of O'Sullivan, the Ninth Circuit, applying Justice Souter's analysis, held that the Arizona Supreme Court removed post-conviction review as a remedy that is available within the meaning of O'Sullivan. See Swoopes, 196 F.3d at 1008-09. Furthermore, the objective of comity, that is, respect for state courts, is met by following the intentions of the Pennsylvania Supreme Court. Taken together O'Sullivan and Swoopes instruct that "[d]isregarding a state supreme court's explicit attempt to control its docket and to decline the comity extended to it by the federal court goes against the very purpose of the exhaustion doctrine and obliterates the concept of comity." Blasi, 128 F. Supp. 2d. at 259.

I hold that Order No. 218 removes a PCRA petitioner from one full round of Pennsylvania's ordinary process of review, and therefore makes discretionary review unavailable for the purposes of the exhaustion requirement under § 2254(c).²⁹ Thus,

²⁸ There are problems with Order No. 218. First, as the Blasi court explained, Order No. 218 is problematic because by "conflat[ing] making a remedy unavailable with waiving the requirement of exhaustion with respect to an available remedy," Order No. 218 is in tension with section § 2254(b)(3), which provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." Blasi, 120 F. Supp. 2d at 468. A second problem, or perhaps another way of perceiving the first, is that Order No. 218 may violate the Supremacy Clause, U.S. Const. art. VI, because it is the federal courts, not the state courts, that must determine whether available remedies have been exhausted before the federal courts can hear the claims. See Mattis, 128 F. Supp. 2d at 259.

²⁹ Order No. 218 does not apply to cases in which the time to petition for review by the Pennsylvania Supreme Court expired prior to the date of the Order. Wenger v. Frank, 266 F.3d 218, 226 (3d Cir. 2001). Order No. 218 became effective on May 9,

Lambert has exhausted her state remedies. Because Lambert timely filed her federal habeas petition, exhausted the claims in her petition, and those claims are not procedurally defaulted, I may consider the claims in Lambert's petition on their merits.³⁰

D. The Status of the State Court Decisions

Lambert argues that the proceedings before the PCRA court and the Pennsylvania Superior Court (collectively the "state court decisions") were void ab initio because the PCRA court did not have jurisdiction to hear Lambert's claims. Lambert's argument rests on the Pennsylvania Supreme Court's decision in Commonwealth v. Fahy, 558 Pa. 313, 737 A.2d 214 (Pa. 1999). The Pennsylvania Supreme Court held in Fahy that the one-year time limit of § 9545 of the PCRA is "jurisdictional." Id. at 217-18. Lambert's time for filing her PCRA petition expired on September 30, 1997. Lambert did not file her PCRA petition until February 2, 1998. Lambert argues that under § 9545(b)(1) the PCRA court was without jurisdiction to entertain her petition and that the Pennsylvania Superior Court should have dismissed Lambert's appeal from the PCRA decision.³¹ Thus, Lambert contends that, because the PCRA court and the Pennsylvania Superior Court lacked jurisdiction to consider Lambert's claims, the findings of fact and

2000. Lambert's time for petitioning the Pennsylvania Supreme Court for review expired on January 17, 2001. Thus, Order No. 218 applies to Lambert's case.

³⁰ If I did not hold that Lambert exhausted all of the claims in her petition in light of Order 218, then her unexhausted claims would be procedurally defaulted. See Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996). To excuse her procedural default, Lambert would need to establish "cause and prejudice" or a "fundamental miscarriage of justice." Whitney v. Horn, 280 F.3d 240, 252-53. She cannot establish either.

³¹ Neither the Commonwealth nor Lambert challenged the timeliness of Lambert's PCRA petition before the state courts. Lambert did not seek re-argument in the Pennsylvania Superior Court on the issue of timeliness to request that the Pennsylvania Superior Court amend its judgment order to reflect dismissal of the PCRA petition on jurisdictional grounds. See Pa.R.A.P. § 2543. Assuming Lambert had made and the Pennsylvania Superior Court denied such a request, Lambert could have petitioned the appeal of the denial to the Pennsylvania Supreme Court.

conclusions of law of these courts should not be afforded any deference in my review and analysis of Lambert's claims.³² Lambert is incorrect.

A state court's determination of jurisdiction based on that state's law is binding on a federal court. See Wright, 151 F.3d at 158; Poe, 39 F.3d at 207; Wills, 532 F.2d at 1059, supra Section B2 ("Period of Statutory Tolling"), n.21. Because a federal habeas court lacks authority to review a state court's determination that it has jurisdiction based on that state's law, this court will not engage in a review of a collateral attack on the jurisdictional determinations of the Pennsylvania state courts that are based on state law. The PCRA court took jurisdiction over Lambert's petition. Although it recognized that Lambert did not satisfy the time requirements of § 9545(b)(1) of the PCRA, the Pennsylvania Superior Court refused to dismiss Lambert's petition as untimely under § 9545(b)(1). Instead, the Pennsylvania Superior Court preserved the findings of the PCRA court and affirmed the decision of the PCRA court in all respects. See Superior Court Opinion at 322-23. Lambert cannot challenge in this federal court the decisions of the PCRA court and the Pennsylvania Superior Court because, despite the apparent untimeliness of Lambert's PCRA petition under § 9545(b)(1), these courts assumed jurisdiction over her petition on the basis of state law. Again, this court will not engage in collateral review of the jurisdictional determinations of the Pennsylvania state courts that are based on Pennsylvania law.³³

³² It is interesting that Lambert failed to raise this argument in the context of whether her petition was timely filed for the purposes of the AEDPA. If the PCRA court and the Pennsylvania Superior Court did not have jurisdiction, then her federal habeas petition could not be timely filed under the AEDPA because her PCRA petition would not have been "properly filed." Lambert cannot have it both ways.

³³ Lambert also moves this court to reinstate Judge Dalzell's findings of fact and conclusions of law under the coordinate jurisdiction doctrine. The law of the case doctrine, "directs courts to refrain from re-deciding issues that were resolved earlier in the litigation." Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116 (3d Cir. 1997) (refusing to apply the law of the case doctrine where the district court issued findings that undermined an earlier conclusion that the plaintiffs had standing to sue).

E. Merits Analysis

1. Review of Lambert's Possible Remedies Under the AEDPA

a. Section 2254(d)

The AEDPA amended the standards for reviewing state court judgments in federal habeas petitions by requiring federal courts to accord greater deference to state court determinations. Section 2254(d) sets forth the standards a petitioner must satisfy for a federal court to grant habeas relief under the AEDPA. Section 2254(d) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

This opinion in no way violates the law of the case doctrine. It does not re-decide issues that were resolved earlier in the litigation. Judge Dalzell did not decide Lambert's case in light of the requirements of the AEDPA. Judge Dalzell decided the merits of Lambert's petition before requiring her to exhaust her state court remedies; therefore, he did not have the benefit of the substantial record generated before the state courts. On November 21, 2001, Judge Dalzell reinstated his findings of fact and conclusions of law of April 21, 1997 on the grounds that the Pennsylvania state courts did not have jurisdiction to hear Lambert's petition. Lambert v. Blackwell, 175 F. Supp. 2d 776, 786-87 (finding that "[s]ince the state courts did not have jurisdiction to hear the case, they could not properly reach the merits, and therefore their findings are void and we need not accord them any deference."). In light of the rule that a federal court may not question a state court's determination that it has jurisdiction based on that state's law, I disagree with Judge Dalzell's analysis. See Poe, 39 F.3d at 207. Thus, I decline to reinstate Judge Dalzell's findings of fact and conclusions of law.

Furthermore, Lambert ignores that the Third Circuit vacated Judge Dalzell's order and refused to give any weight to his factual findings because he failed to dismiss Lambert's petition for her failure to exhaust her state remedies. Lambert v. Blackwell, 134 F.3d 506, 509 n.1 (3d Cir. 1997). Therefore, Judge Dalzell's findings of fact and conclusions of law have no effect on my consideration of Lambert's habeas petition. See Stone v. Williams, 970 F.2d 1043, 1054-55 (2d Cir. 1992), cert. denied, 508 U.S. 906 (1993) (finding that a judgment which has been vacated or set aside has no preclusive effect); United States v. Williams, 904 F.2d 7, 8 (7th Cir. 1990) (finding that a vacated judgment "place[s] the parties in the position of no trial having taken place at all"); Rushton Mining Co. v. Morton, 520 F.2d 716, 719 (3d Cir. 1975) (finding that vacatur renders lower court's order "void *ab initio*"); Simpson v. Motorists Mutual Ins. Co., 494 F.2d 850, 854 (7th Cir. 1974), cert. denied, 419 U.S. 901, 95 S. Ct. 184 (1974).

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d). On its face, § 2254 applies only in respect to claims that were "adjudicated on the merits in State court proceedings." § 2254(d). In Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000), cert. denied, 532 U.S. 924 (2001), the Third Circuit held that the standard of review established by 2254(d) does not apply unless it is clear from the face of the state court decision that the merits of Lambert's claims were examined in light of federal law as established by the Supreme Court of the United States.³⁴ Even a "summary adjudication" constitutes an "adjudication on the merits." Chadwick v. Janecka, 302 F.3d 107, 116 (3d Cir. 2002). The PCRA court and the Pennsylvania Superior Court decided Lambert's case on the merits. Accordingly, the highly deferential standard of review established by the AEDPA applies to Lambert's claims.

b. § 2254(d)(1): A decision that was "Contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"

In Terry Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court of the United States held that a state court decision will be contrary to clearly

³⁴ It is not clear whether the Third Circuit would require the state courts to discuss specifically the applicable federal precedent. See Abu-Jamal v. Horn, No. 99-5089, 2001 WL 1609690, at *10 n.8 (E.D. Pa. December 18, 2001). Courts of appeals in other circuits have held that to adjudicate a claim on the merits, the State court need not cite federal case law; it is enough if the law identified by the State court is not contrary to clearly established federal law at the time the decision. See, e.g., Whitmore v. Kemna, 213 F.3d 431, 434 (8th Cir. 2000); Van Woudenberg v. Gibson, 211 F.3d 560, 569-70 (10th Cir. 2000).

established law only if one of the following conditions is satisfied.³⁵ First, "[a] state court decision will...be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." Id. at 405. "A state court decision will also be contrary to...clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme Court] and nevertheless arrives at a result different from [United States Supreme Court] precedent." Id. at 406. Under § 2254(d)(1), only if a state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on materially indistinguishable facts may a federal court grant a writ of habeas corpus.

In Part II of Justice O'Connor's opinion, the Court addressed the proper standard of review under the "unreasonable application" clause.³⁶ See id. at 408-13. A federal habeas court may grant a petitioner's writ pursuant to the "unreasonable application" clause "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The Court then explained that in making the "unreasonable application" inquiry, a federal court must ask whether the state court's application of clearly established federal law was "objectively unreasonable" as opposed to merely "incorrect." Id. at 410. "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. The Court's interpretation of the "unreasonable application" clause reflects that under the AEDPA

³⁵ Justice Stevens wrote an opinion for the Court of which Parts I, III and IV received a majority vote. Justice O'Connor wrote a separate opinion of which Part II of her opinion received a majority vote, except that Justice Scalia did not join in a footnote regarding the legislative history of § 2254(d)(1). Part II of Justice O'Connor's opinion is the majority view regarding the proper interpretation of § 2254(d)(1).

³⁶ The Court held that the "contrary to" and "unreasonable application" clauses should be considered as having independent meaning. See Terry Williams, 529 U.S. at 405-06.

federal courts owe greater deference to state court applications of law to fact than under prior law. See id. at 404; see also Werts v. Vaughn, 228 F.3d 178 (3d Cir. 2000); Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996).

c. § 2254(d)(2) A Decision "Based on an Unreasonable Determination of the Facts in Light of the Evidence Presented"

Section 2254(d)(2) authorizes a federal court to grant an application for a writ of habeas corpus where the state court based its decision on an "unreasonable determination of the facts in light of the evidence presented in the State court proceedings." § 2254(d)(2). Neither the Supreme Court nor the Third Circuit has yet addressed the explicit scope of this provision. In Abu-Jamal, Judge Yohn concluded that section 2254(d)(2) "requires a review of the record to determine whether, 'in light of the evidence presented' the state court unreasonably determined the facts." Abu-Jamal, 2001 WL 1609690, at *12. Because the terms of § 2254(d)(2) limit an inquiry into the reasonableness of the factual determination "to the evidence presented," a "federal habeas court must confine its § 2254(d)(2) review to an analysis of evidence in the record." Id.

Also, § 2254(d)(2) requires that a federal court must review the state court record to determine the reasonableness of the state court's factual determinations. See id. (citing Campbell v. Vaughn, 209 F.3d 280, 288-89 (3d Cir. 2000) (finding relief unwarranted under § 2254(d)(2) in the face of conflicting testimony and state court made credibility determination); Bryson v. Ward, 187 F.3d 1193, 1204 (10th Cir. 1999) (denying relief under § 2254(d)(2) because "the record does not contradict the trial court's assessment of a factual issue").

Finally, a federal court must assess the reasonableness of the state court's factual determinations through the lens of section § 2254(e)(1), which requires federal courts to

apply a presumption of correctness to factual determinations made by the state court.³⁷ A federal habeas court "must afford state courts' factual findings a presumption of correctness, which the petitioner can overcome only by clear and convincing evidence." Duncan v. Morton, 256 F.3d 189, 196 (3d Cir. 2001) (citing 28 U.S.C. § 2254(e)(1)). The presumption applies to the reasonable factual determinations of state trial and appellate courts. See id. State court factual determinations that are "well-supported and subject to the presumption of correctness" are not "unreasonable." Id. at 198. When read together with section 2254(d)(2), § 2254(e)(1) instructs federal courts to presume correct the determinations of a state court unless the petitioner clearly and convincingly demonstrates otherwise.

Finally, in reviewing the state court factual determinations, I am mindful of the Supreme Court's recent instruction that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." Miller-El v. Cockrell, 123 S. Ct. 1029, 1041, 537 U.S. ___ (2003). A federal habeas court has an obligation to give full consideration to the evidence in the record, and must not simply "rubber stamp" the findings of the state courts.³⁸ See id.

³⁷ Section 2254(e)(1) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption by clear and convincing evidence.

§ 2254(e)(1).

³⁸ The Pennsylvania Superior Court noted that Judge Stengel stated on a number of occasions that the facts alleged by Lambert would not have changed the outcome of her 1992 bench trial. Also, in reviewing Lambert's PCRA petition, the Pennsylvania Superior Court observed that because it was a bench trial, Judge Stengel was "in a unique position to say what would have made a difference in the truth-determining process in 1992. [The PCRA court] knows what affected the outcome of the case, knows what was important in the truth-determining process and knows what was material." Superior Court Opinion at 362. Thus, the Superior Court determined that there was "no need...to project

2. The Legal Standards Governing Lambert's Claims

In her petition for a writ of habeas corpus, Lambert claims that her conviction and sentence were wrongful and that after-discovered evidence demonstrates that she is actually innocent of first degree murder in the death of Laurie Show. Lambert's claims of prosecutorial misconduct, after-discovered evidence and ineffective assistance of counsel are also presented in support of her claim of actual innocence. In addition to her federal habeas petition, Lambert filed a 160 page "Supplement To Petition for Writ of Habeas Corpus" (the "supplement") which sets forth the factual basis of her claims. Her supplement lists the factual bases for her claims in 394 paragraphs and hundreds of subparagraphs.

Lambert's petition and supplement barely comply with the local rules governing habeas petitions. See Eastern District of Pennsylvania Local R. Civ. P. 9.4. Lambert fails to organize the facts in a way that connects them to her legal claims. Rather than concisely state her claims for relief and support them with material facts as required by the local rules, Lambert catalogs hundreds of mostly factual claims under various headings. Only in a few places in the supplement does Lambert attempt to explain how her factual claims demonstrate a particular violation of federal constitutional law, and then only by the occasional reference to federal constitutional law. Also, other than conclusory statements to the effect that the state courts' determinations and decisions were "unreasonable," Lambert fails to analyze her claims under the framework of the AEDPA.

what might have mattered and what might have affected [a] jury's analysis of this case." Id. Having researched this issue, it cannot be said that this conclusion was either "contrary to" or "involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." § 2254(d)(1).

In her supplement, Lambert paints a picture of the Commonwealth's attempt to frame her for the murder of Laurie Show.³⁹ On Lambert's theory, Yunkin is the "real killer." Lambert initially "covered" for him as a natural response to the abuse she suffered during the course of their relationship. Lambert rests her claims on snippets of testimony, immaterial inconsistencies, and empty speculation that she claims, when combined and set against the background of her conspiracy theory, entitle her to federal habeas relief.

The structure of Lambert's petition and supplement precludes an effective organization for review of her claims directly. For this reason, I will follow the approach taken by the state courts and begin by reviewing the federal constitutional law that governs Lambert's petition.⁴⁰ I then review and analyze her claims, organized according to the headings of her supplement and the state court decisions. I interpret the allegations in Lambert's petition and supplement most charitably as claims for violations of federal constitutional law and within the statutory framework of the AEDPA.

³⁹ Lambert believes the police framed her. Part of the basis for this conspiracy theory is Lambert's allegation that three officers of the East Lampeter Township Police gang raped her on June 17, 1991. The PCRA court found that other than Lambert's own statement, there is no proof the gang rape occurred. PCRA Opinion at *54. Lambert did draw a picture of one of the rapists that was later "identified" in testimony by Mr. Shirk, Lambert's counsel, as Officer John Bowman of the East Lampeter Township Police. Id. At the PCRA hearing, Lambert's counsel characterized Bowman as one of the gang rapists. Id. Ms. Christina Rainville co-counsel for Ms. Lambert even suggested throughout the hearing that Lambert's child born in March 1992 was the product of the alleged gang rape. Id. at 55; (N.T., PCRA at 32). Lambert's counsel even subpoenaed Bowman's bank records for a three month period in 1991, including a period during which the alleged gang rape took place and Bowman asserted he was honeymooning in Virginia with his wife. Id. at *54 n.71. But at oral argument on Lambert's motion to compel the production of these bank records, Rainville informed the court that Bowman was no longer being accused of rape. Id.

⁴⁰ It is axiomatic that a federally issued writ of *habeas corpus* "reaches only convictions obtained in violation of some provision of the United States Constitution." Smith v. Phillips, 455 U.S. 209, 221 102 S. Ct. 940 (1982).

(a) The Standard for Prosecutorial Misconduct, Including After Discovered Evidence, and the Alleged Brady / Giglio Violations

Lambert alleges 157 instances of prosecutorial misconduct including 66 allegations of Brady / Giglio violations.⁴¹ Among these allegations, Lambert contends that she was subjected at trial to the Commonwealth's presentation of false evidence, fabricated evidence, intentional withholding of exculpatory and favorable evidence and disowning of evidence used to convict her. Lambert claims that habeas relief is warranted because of the Commonwealth's "completely intentional" efforts to withhold and destroy crucial evidence. Pet. Supp. at ¶ 36. As the PCRA court observed, Lambert's claim of prosecutorial misconduct is perhaps the most troubling part of this entire case. "This is the area where concerns about the integrity of the system, the corruption of the criminal trial process, and alleged unethical conduct by the prosecuting attorney and the investigative detectives come under sharp scrutiny." PCRA Opinion at *11.

Prosecutorial misconduct does not by itself provide grounds for relief. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). As the Supreme Court explained in Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940 (1982), "[b]efore a federal court may overturn a conviction resulting from a state trial...it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Id. at 221 (quoting Cupp v. Naughten, 414 U.S. 141, 146, 94 S. Ct. 396 (1973)). The petitioner must demonstrate that the prosecutorial misconduct rises to the level of a due process violation because the prosecutorial misconduct affects the fundamental fairness of the entire proceedings. See Donnelly, 416 U.S. at 643; Lam v.

⁴¹ A Brady violation occurs where a prosecutor suppresses exculpatory evidence in a way that prejudices the accused. See Brady v. Maryland, 373 U.S. 83 (1963). A Giglio violation occurs when a state convicts a defendant based on testimony the prosecution knows is perjured and that prejudices the defendant. See Giglio v. United States, 405 U.S. 150 (1972).

Kelchner, 304 F.3d 256, 271-72 (3d Cir. 2002). The test is whether the prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. In examining the impact of the alleged prosecutorial misconduct, a court must examine the entire proceeding to determine whether the conviction resulted from a denial of due process. See id.

_____ Lambert's supplement contains claims that the prosecution failed to turn over to the defense exculpatory evidence in violation of her constitutional rights as set forth in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) and its progeny. In Brady, the Supreme Court held that "the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." Brady, 373 U.S. at 104. This rule was modified in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976), to require a prosecutor to disclose exculpatory evidence even when there has not been a request for the information by the defendant.⁴² Impeachment evidence also constitutes exculpatory evidence under Brady and its progeny. See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375 (1985).

⁴² Claims of after-discovered evidence are analyzed under the framework of Brady and its progeny. See Bagley, 527 U.S. at 280; Hollman v. Wilson, 158 F.3d 177 (3d Cir. 1998); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991). In Agurs, the Court distinguished three situations involving the discovery, after trial, of information favorable to the defendant that had been known to the prosecution but not the defense: (1) where the prosecutor's knowing use of perjured testimony, or knowing failure to disclose that testimony used to convict the defendant was false; (2) where the defendant did not make a Brady request and the prosecutor fails to disclose certain evidence favorable to the accused; and (3) where the defense makes a specific request and the prosecutor fails to disclose the requested evidence. See Agurs, 427 U.S. at 107-11; see also Bagley, 473 U.S. at 678-81 (discussing the three situations identified in Agurs in which information favorable to the accused and known to the prosecution but not the defense comes to light after trial). In Bagley, the Supreme Court held that the evidence at issue in each of these situations is "material" under Brady, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 527 U.S. at 280.

There are three components to a Brady violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State either willfully or inadvertently; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936 (1999). A new trial will be granted for a Brady violation only if the defendant can demonstrate both that the prosecution withheld exculpatory evidence, and that the evidence was material. See United States v. Pelullo, 105 F.3d 117, 122 (3d Cir. 1997). The materiality of the suppressed evidence is considered "collectively, not item by item." Kyles v. Whitley, 514 U.S. 419, 436, 115 S. Ct. 1555 (1995). Evidence is material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375 (1985); see also Strickler, 527 U.S. 263, 281-82. There is no Brady violation unless the nondisclosure by the prosecution was so serious that there is a reasonable probability that the suppressed evidence would have produced a "different verdict." Strickler, 527 U.S. at 281. A "reasonable probability" exists when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678.

The prosecutor has a duty to learn of any favorable evidence known to those acting on the government's behalf, including the police. See Strickler, 527 U.S. at 281. The prosecution is only "'obligated to produce certain evidence actually or constructively in its possession or accessible to it.'" Hollman v. Wilson, 158 F.3d 177, 180 (3d Cir. 1998) (quoting United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991) (finding a Brady violation where the prosecution failed to provide the defense with a witness' criminal history report). There is no Brady violation unless the prosecutor actually or constructively possessed the information. Constructive possession means that a prosecutor "should ... have known that the material at issue was in existence." United States v. Joseph, 996 F.2d 36, 39 (3d Cir. 1993). No Brady violation will be found where

the government diligently searches for requested exculpatory material. See Hollman, 158 F.3d at 181.

A defendant's right to due process is also implicated when the state convicts a defendant based on testimony the prosecution knows is perjured. Giglio v. United States, 405 U.S. 150, 153-55, 92 S. Ct. 763, 765-66 (1972); Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959). Giglio and Napue "embody the rule that the state's knowing use of perjured testimony to obtain a conviction is constitutional error, but that does not automatically entitle petitioner to relief." Robinson v. Arvonio, 27 F.3d 877, 883 (3d Cir. 1994). A petitioner must also establish that the error is not harmless. See id. In Brecht v. Abrahamson 507 U.S. 619, 113 S. Ct. 1710 (1993), the Court held that the standard for harmless error is whether, in light of the record as a whole, the error resulted in "actual prejudice" to the defendant. Brecht 507 U.S. at 637. Actual prejudice results when the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239 (1946)).⁴³

Lambert's supplement contains allegations that the Commonwealth violated her federal constitutional rights by destroying potentially useful evidence in bad faith.

Assuming the State has complied with its duties under Brady, to establish a violation of

⁴³ There are two kinds of constitutional error at trial. A "structural error" applies to the entire trial and requires reversal because "it involves a deprivation of a constitutional protection so basic that in its absence, 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" Robinson, 27 F.3d at 883-84 (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265 (1991)). A biased judge might constitute structural error. See Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927). A "trial error" occurs during the presentation of the case to the jury, and thus is assessed "in the context of other evidence presented in order to determine whether its admission was harmless...." Fulminante, 499 U.S. at 307-08. A jury instruction that misstates an element of an offense, for example, is a trial error. See Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101 (1986). Structural error cannot be harmless, but trial error can be. Fulminante, 499 U.S. at 310.

the due process clause of the Constitution, a petitioner must demonstrate that the State violated "some constitutional duty over and above that imposed by cases such as Brady and Agurs." Arizona v. Youngblood , 488 U.S. 51, 56, 109 S. Ct. 333 (1988). In Youngblood, the Court reasoned that while the good or bad faith of the State is irrelevant when the State fails to disclose potentially exculpatory evidence, "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material." Id. at 57. The Court refused to read the "fundamental fairness" requirement of the Due Process Clause "as imposing on the police an undifferentiated and absolute duty to retain and preserve all material that might be of considerable evidentiary significance in a particular prosecution." Id. at 58. Thus, the Court held that unless a criminal defendant can demonstrate bad faith on the part of the State, failure to preserve potentially useful evidence does not violate due process of law. See id. Negligence in the handling of evidence does not constitute bad faith. See id. The presence or absence of bad faith for the purposes of the Due Process Clause turns on the police's knowledge of the exculpatory value of the evidence at the time that the evidence was lost or destroyed. See id.

_____ (b) The Standard for Ineffective Assistance of Counsel

Lambert claims that her trial and appellate counsel were ineffective in a number of ways. A defendant has a Sixth Amendment right to "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). To establish a violation of this right, a defendant must demonstrate both unprofessional conduct on the part of his or her counsel and, in most cases, prejudice as a result. See id.; United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992). More precisely, the defendant must demonstrate, by a preponderance of the evidence, that: (1) "his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms," Day, 969 F.2d at 42 (citing Strickland, 466 U.S. at 687-91); and (2)

that there is a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. A "reasonable probability" means a "probability sufficient to undermine confidence in the outcome." Day, 969 F.2d at 42.

(c) Actual Innocence

Lambert claims that she is actually innocent of the murder of Laurie Show and that no credible evidence exists to support a finding that she is guilty. Thus, I must analyze the unique role occupied by a claim of actual innocence in federal habeas review.

In Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853 (1993), the Supreme Court held that federal habeas review is not available "absent an independent constitutional violation occurring in the underlying state criminal proceeding," and that "a claim of 'actual innocence' is not itself a constitutional claim." Id. at 400, 404. Once a defendant is found guilty after a fair trial in the state court, he or she is no longer entitled to a presumption of innocence, and thus comes before the federal habeas court not as one who is innocent, but as a convicted criminal. See id. at 399-400. Because such a determination in the state criminal trial is "a decisive and portentous event" and "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the guilt or innocence of one of its citizens," freestanding claims of actual innocence are not reviewable in federal habeas actions. Id. at 401 (quoting Wainwright v. Sykes, 433 U.S. 72, 90, 97 S. Ct. 2497 (1977) (quotations omitted)).⁴⁴ Thus, the Court rejected Herrera's claim that, even if the proceedings that resulted in his conviction and sentence were entirely fair and error free, his innocence would make his execution a constitutionally intolerable event.

⁴⁴ Except to the extent that possible or actual innocence constitutes an element of the underlying constitutional right, the claim's bearing on innocence is irrelevant to federal habeas review. See Kimmelman v. Morrison, 477 U.S. 365, 379 (1986); Jackson v. Virginia, 443 U.S. 307 (1979).

While a freestanding claim of actual innocence is not cognizable in federal habeas review, innocence is relevant where a petitioner seeks relief on a potentially meritorious claim that faces a procedural bar. After explaining that actual innocence by itself is not a ground for relief in federal habeas proceedings, the Court in Herrera stated:

This is not to say that our habeas jurisprudence casts a blind eye toward innocence ... we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons....But this body of habeas jurisprudence makes clear that a claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

Herrera, 506 U.S. at 404. Thus, a claim of actual innocence opens a "gateway" through procedural default to review by a federal habeas court. Id.⁴⁵

In Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851 (1995), the United States Supreme Court considered a claim of actual innocence by a death-row petitioner. In Schlup, the Court expanded on its determination in Herrera that "actual innocence" is not a freestanding claim, but a means of saving other constitutional claims from procedural bar. Because Schlup failed to establish "cause and prejudice" sufficient to excuse his failure to present his evidence in his first federal petition, he claimed actual innocence "only" to bring his petition within the "narrow class of cases ... implicating a fundamental miscarriage of justice" as a means of saving his otherwise procedurally void constitutional claims Id. at 314-15 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)). The Court held that to establish a "fundamental miscarriage of justice," a petitioner must demonstrate that "a constitutional violation has probably resulted in the

⁴⁵ The Court in Herrera also left open the possibility that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." Herrera, 506 U.S. at 417.

conviction of one who is actually innocent." *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Taken together, *Herrera* and *Schlup* instruct that freestanding claims of actual innocence are not cognizable in federal habeas review, but may be used to prevent other constitutional claims from being procedurally barred.

A petitioner may rely on a claim of actual innocence only: (1) in some capital cases, that is, "where a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim," *Herrera*, 506 U.S. at 417; and (2) to avoid the preclusive effects of a procedural bar. *See Schlup*, 513 U.S. at 314-15. Lambert's petition does not fall into either of these categories. Hers is not a capital case; nor do her claims of constitutional violations run the risk of procedural bar. Accordingly, Lambert's claim of actual innocence is not reviewable in this federal habeas action.⁴⁶

(d) The Claim that the PCRA Proceedings Were Unfair

Lambert's petition contains serious claims that, among other things, the PCRA court demonstrated bias toward her at every stage of the proceedings, misrepresented the record to harm her, and intentionally manipulated its findings to prejudice her. These claims underpin numerous assertions of error in her post-conviction proceedings, including but not limited to, claims that the PCRA court refused Lambert the right to cross examine police and prosecutor witnesses, completely ignored the proper standard of review, improperly excluded and limited testimony, and inconsistently applied the hearsay rule.

⁴⁶ Even if Lambert could assert a claim of actual innocence, it is noteworthy that the PCRA court determined that she was "not, and never will be, 'innocent' of this crime." PCRA Opinion at *136.

Lambert's claims of errors by the PCRA court fail to assert viable federal habeas claims. The weight of authority holds that such errors are simply not reviewable in a federal habeas proceeding. "[T]he federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into a habeas calculation." Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998).⁴⁷ Like Judge Yohn, who confronted the same issue in

Abu-Jamal, I am persuaded by the Eighth Circuit's statement of the rationale for this rule: Adequacy or availability of the state post-conviction procedures is material here only in the context of exhaustion of state remedies of federally protected rights and not to review alleged trial errors. Errors or defects in the state post-conviction proceedings do not, ipso facto, render a prisoner's detention unlawful or raise constitutional questions cognizable in federal habeas corpus proceedings.... Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself.

Abu-Jamal, 2001 WL 1609690, at *127-29 (quoting Williams v. Missouri, 640 F.2d 140, 143-44 (8th Cir. 1991)). Therefore, Lambert's claims of error by the PCRA court do not constitute viable federal habeas claims.

⁴⁷ See, e.g., Morris v. Cain, 186 F.3d 581, 585 n.6 (5th Cir. 1999) (finding that "errors in state post-conviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief"); Williams-Bey v. Trickey, 894 F.2d 314, 317 (8th Cir. 1990) ("Section 2254 only authorizes federal courts to review the constitutionality of a state criminal conviction, not infirmities in a state post-conviction relief proceeding"), cert. denied, 495 U.S. 936 (1990); Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989), cert. denied sub nom., Franzen v. Deeds, 493 U.S. 1012 (1989); Hopkinson v. Shillinger, 866 F.2d 1185, 1219-20 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990); Bryant v. Maryland, 848 F.2d 492, 493 (4th Cir. 1988) ("claims of error occurring in a state post-conviction proceeding cannot serve as a basis for federal habeas corpus relief"); Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987); Kirby v. Dutton, 794 F.2d 245, 247-48 (6th Cir. 1986). But see Dickerson v. Walsh, 750 F.2d 150, 153-54 (1st Cir. 1984) (determining that claims of error during post-conviction proceedings are properly the subject of habeas review).

3. The Claims in Lambert's Supplement

I next turn to an evaluation of the PCRA court's factual and legal determinations. First, I will determine if the PCRA court's factual determinations are "unreasonable...in light of the evidence presented" to it. § 2254(d)(2). I will uphold all of the factual determinations of the PCRA court. Secondly, I will review the PCRA court's findings of law, most of which are based upon its factual findings, to determine whether its findings of law were either "contrary to" or "involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). I will also uphold the legal conclusions of the PCRA court.

(a) The Sweatpants

Lambert claims that "[t]he Commonwealth's conduct with respect to the sweatpants goes to the heart of this case." Pet. Supp. at ¶ 1. Lambert asserts that because the Commonwealth had no other clothing with blood on it connecting Lambert to the crime scene, the Commonwealth coached Lawrence Yunkin to testify at trial that Lambert wore his black sweatpants at the crime scene. Id. Lambert claims that the Commonwealth coached Yunkin to change his story and testify that Lambert wore the sweatpants to the scene instead of her own clothing. This was part of the Commonwealth's attempt to "frame" Lambert as the killer.

Lambert speculates that the Commonwealth "switched" the sweatpants between the 1992 trial and her federal habeas hearing before Judge Dalzell in 1997. In the proceeding before Judge Dalzell, Lambert characterized Yunkin's sweatpants as "grossly oversized clothing," and thus argued that the sweatpants would have severely restricted her movements, making it unlikely that she could have killed Show. Lambert's characterization of the sweatpants as "grossly oversized" was at odds with the size of the sweatpants produced by the Commonwealth at the federal habeas hearing. Thus, Lambert believes that the Commonwealth must have switched the sweatpants. Id. Accordingly,

Lambert claims that the prosecution committed severe prosecutorial misconduct because: (1) the prosecution coached Yunkin to commit perjury, attempting to "frame" her; and (2) intentionally and in bad faith destroyed the potentially useful evidence of the sweatpants.

According to the Commonwealth, however, the sweatpants produced at the federal habeas hearing were the same as those produced in Lambert's 1992 trial. Lambert disputes this assertion that the original sweatpants cannot be found. The Commonwealth maintains that there was no prosecutorial misconduct.

The PCRA court found that the sweatpants admitted into evidence had never been "altered, changed, or substituted." PCRA Opinion at 90. After an analysis of the trial testimony and other aspects of the record regarding the sweatpants, the PCRA court determined that "there is absolutely no merit to the contention that Mr. Yunkin's testimony about Ms. Lambert wearing his clothes was false or perjured." PCRA Opinion at *89. As the PCRA court characterized Lambert's claim, "[a]rmed with the *assumption* that Commonwealth's Exhibit 9 [the sweatpants] was, in fact, a grossly oversized pair of baggy sweatpants and faced with a pair of black sweatpants which do not appear to be 'grossly oversized,' petitioner's counsel leaped to the conclusion that the sweatpants were 'switched.'" PCRA Opinion at *89. Perhaps most significantly, it found that even if the sweatpants had been switched "this is not a fact that would have changed the outcome of the 1992 trial nor did it so undermine the truth-determining process in 1992 that no reliable verdict was possible."⁴⁸ *Id.* at *90. The Pennsylvania Superior Court found that the PCRA court's conclusions and credibility determinations were supported by the record. Superior Court Opinion at 330.

After reviewing the record, I uphold the PCRA court's factual determination that the Commonwealth did not switch the sweatpants between Lambert's 1992 trial and her

⁴⁸ The PCRA court also found that these assertions appear to be the product of the "creative machinery" designed to construct a conspiracy theory that the police framed Lambert, perhaps because she said she had once been gang raped by three East Lampeter police officers. PCRA Opinion at *89 n.90.

federal habeas hearing before Judge Dalzell. I also uphold the credibility determinations of the PCRA court that Yunkin's testimony about Lambert wearing his clothes was neither false nor perjured. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual determinations. Thus, the PCRA court's decision that the Commonwealth did not switch the sweatpants between the 1992 trial and the federal habeas hearing before Judge Dalzell was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

Although not articulated by Lambert, her contention of prosecutorial misconduct seems to be predicated on Giglio. Under Giglio, Lambert must demonstrate that: (1) the state used perjured testimony to obtain her conviction; and (2) the state's use of the perjured testimony caused her actual prejudice.⁴⁹ See Robinson, 27 F.3d at 883. Under the PCRA court's factual ruling that I have upheld, the Commonwealth neither altered nor switched the sweatpants; nor was Yunkin's testimony about Lambert wearing his clothes false or perjured. Most significantly, even if the sweatpants had been switched in 1997, this is not a fact that would have changed the outcome of the 1992 trial, nor would it have so undermined the truth-determining process in 1992 that no reliable verdict was possible. See Donnelly, 426 U.S. at 643; see also PCRA Opinion at 90. This conclusion of the PCRA court that Lambert failed to prove that the Commonwealth violated Giglio was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(b) The Crime Scene Photographs

Lambert next claims that the police altered the crime scene and fabricated photographs of the crime scene in an attempt to discredit Lambert's statements that Buck

⁴⁹ Lambert can establish a violation of neither Brady nor Youngblood because the facts giving rise to her allegations that the Commonwealth switched or destroyed the sweatpants occurred after her 1992 trial. Her claim that the prosecution violated Giglio, on the other hand, concerns the 1992 trial.

tore a telephone from Show's hands and threw it across the room before murdering her. Pet. Supp. at ¶ 22. Lambert believes that the police were so intent on framing her as the murderer, even at the risk of diminishing Buck's involvement in Show's murder, that they found it necessary to alter the crime scene and fabricate photographs of it, to discredit her version of what happened inside the apartment. Pet. Supp. at ¶¶ 28-32. Moreover, because Lambert provided her statement to the police about Buck throwing the phone on the night of Lambert's arrest, the photographs depicting the phone wrapped around Show's leg must have been taken after Lambert's statement, thus proving that the police brought Show's body back to the crime scene "in order to incriminate Lambert." Pet. Supp. at ¶ 29. Thus, Lambert claims that the prosecutors engaged in misconduct by altering and destroying the crime scene photographs.⁵⁰

The PCRA court stated that, Lambert's theory "just does not make any sense." PCRA Opinion at *99. The PCRA court found that the police did not alter the crime scene, fabricate photographs of the crime scene or destroy crime scene photographs. See PCRA Opinion at 98. One reason the PCRA court found as it did, is that the police would have been compromising evidence of Buck's involvement which they never sought to do at any other point in time. In fact, the Commonwealth pursued a first degree murder conviction against Buck, resulting in a jury verdict of second degree murder.

Furthermore, the PCRA court found no evidence to support Lambert's claims that the crime scene was altered or that photographs of the crime scene were missing or destroyed. See id. On appeal to the Pennsylvania Superior Court, Lambert claimed that Trooper Reeves's ("Reeves") testimony at the PCRA hearing proves that the police altered the crime scene, and now claims that Reeves's testimony supports federal habeas relief.⁵¹ Pet. Supp. at ¶ 22, ¶ 23. The Pennsylvania Superior court determined that the

⁵⁰ Buck is serving a life sentence for her role in the murder of Laurie Show.

⁵¹ Lambert includes in her supplement the following testimony of Trooper Reeves in response to questioning by Lambert's counsel at the PCRA hearing:

PCRA court properly evaluated Reeves's testimony and determined that Lambert mischaracterized Reeves's testimony. See Superior Court Opinion at 331. The court

Q: You're now looking at Petitioner's Exhibit 1501 and Petitioner's Exhibit 1289. Do these refresh your recollection of where the telephone was on the morning of December 20th?

A: Have we had this photograph authenticated?

Q: No.

A: Well, then, counselor, I'm not about to make any testimony on it at all.

Q: Okay. So the photograph doesn't refresh your recollection. Is that right, sir?

A: Not until I see more of it. I'm looking at a pair of feet, a telephone and I'm not even quite sure this is the crime scene. I prefer to have that authenticated, who took it, and this is an actual crime scene photograph of the Show residence.

Q: Are you saying, sir, that's not how you remember the Show residence that morning?

A: Counselor, let's be fair about this. You're showing me a photograph of some feet and a telephone and a cord. Now, I'm not sure this is the exact crime scene or not. What I'm asking is can we have the photograph authenticated, who took it? And is this an actual photograph of the crime scene we're talking about here?

Q: It causes you some concern?

A: Yes, it causes me a lot of concern.

Ms. Fawcett: Your Honor, I object. That was improper.

The Court: I will strike that last comment.

Ms. Fawcett: The purpose for showing the exhibits to the witness was to refresh his recollection. He's indicated he doesn't – it is not refreshing his recollection. I think I will object unless we move on.

The Court: And that's as far as it goes.

noted that according to the portion of Reeves's testimony included in Lambert's petition, Reeves did not testify that the crime scene had been altered. Reeves "stated only that he would not answer any questions related to the photograph offered by Appellant's counsel during the PCRA proceedings unless the photograph was first authenticated, and as between the unauthenticated and the authenticated crime scene drawing, he preferred to rely on the authenticated crime scene drawing." Superior Court Opinion at 331. Reeves's testimony does not support Lambert's claim that the crime scene photographs had been altered.

Lambert questioned almost every witness who was present at the crime scene on the morning of the murder about the location of the phone cord, including Officer Weaver whose diagram of the scene did not depict the phone cord around the victim's leg. PCRA Opinion at *99. None of these witnesses was able to recall specifically whether the cord was wrapped around the victim's leg. Id. Nevertheless, Lambert seizes upon this "wholesale lack of recollection about a detail of questionable relevance and parlays it into an affirmative statement that the telephone cord was not wrapped around the leg of the victim." PCRA Opinion at *99. Thus, the PCRA court found that with respect to Lambert's allegations of prosecutorial misconduct surrounding the crime scene photographs, Lambert "established nothing by way of facts or evidence to show that these photographs were somehow fabricated or changed," and therefore "nothing about these photographs undermined the truth-determining process or would have changed the outcome of the trial."⁵² Id. at *100. The Pennsylvania Superior Court affirmed the findings of fact and conclusions of law of the PCRA Court.

After reviewing the record, I uphold the PCRA court's factual determinations that the police did not alter the crime scene, fabricate photographs of the crime scene, or

⁵² The PCRA court also found that: the photographs were not "after-discovered evidence" because they were available to Lambert at her 1992 trial; the crime scene was not cleaned or otherwise altered before the photographs were taken; and the crime scene photographs were not missing or destroyed.

destroy photographs of the crime scene, and that none of the testimony of any of the witnesses present at the crime scene on the morning of the murder established that the crime scene was altered. Lambert fails to present evidence to demonstrate, no less to demonstrate clearly and convincingly, that a presumption of correctness should not apply to these factual and credibility determinations. Thus, the PCRA court's decision that "[t]here is simply no proof of any prosecutorial misconduct, destruction of evidence or fabrication of evidence arising out of these facts" was not based on an unreasonable determination of the facts in light of the evidence presented to it. PCRA Opinion at *104; See § 2254(d)(2).

There is no evidence that the Commonwealth "willfully or inadvertently" suppressed evidence or that the photographs were fabricated or destroyed. See Strickler, 527 U.S. at 281-82; see also Youngblood, 488 U.S. at 58. And nothing about the photographs undermined the truth-determining process or would have changed the outcome of Lambert's 1992 trial. See id. The crime scene photographs did not infect Lambert's trial with unfairness so as to make her conviction a denial of due process. See Donnelly 416 U.S. at 643. The conclusion of the PCRA court that the Commonwealth did not commit prosecutorial misconduct regarding the crime scene photographs was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(c) The Commonwealth's Brady Violations

Lambert claims that there is clear and convincing evidence that the Commonwealth committed Brady violations of an "unprecedented magnitude." Pet. Supp. at ¶ 35. Lambert alleges a total of 66 Brady and Giglio violations in her PCRA petition. Lambert's supplement includes the same allegations. The "most egregious" of these violations, Lambert claims, concerns the Commonwealth's failure to disclose an

interview with Kathleen Bayan ("Bayan"), a resident of Show's condominium complex. Pet. Supp. at ¶ 37.

On July 7, 1992, Bayan provided a statement that she had observed Yunkin, Buck, and Lambert in a car inside the condominium complex on the morning of the murder. Bayan's statement is significant, Lambert claims, because defense counsel could have used her testimony at Lambert's 1992 trial to rebut Yunkin's testimony that he was not inside the complex, and thus was not an "unknowing participant." Id. The Commonwealth intentionally denied Lambert access to this testimony, which "went to the heart of counsel's defense of Lambert, and would have been 'extremely important' according to Lambert's trial counsel, who 'beyond a doubt' would have called Mrs. Bayan to testify." Id. at ¶ 39. Lambert believes that Bayan's testimony is "exculpatory" because it "corroborates" her version of what happened on the morning of the murder. Id. at ¶ 46. In other words, she believes that Bayan's testimony helps prove that the Commonwealth framed her and that the real killer is Yunkin.

The PCRA court found that the Commonwealth's failure to disclose Bayan's statement did not constitute a Brady violation. PCRA Opinion at *73. The PCRA court determined that as of early July 1992 during her trial, Lambert maintained that she had fled on foot from the Show condominium to Oak View Road. At that point in time, Lambert did not claim, as she did later, that: Yunkin was inside the complex; that she and Buck entered Yunkin's car in the complex; or that they entered the condominium complex and drove around for any purpose. See PCRA Opinion at *71. Thus, the PCRA court determined that, at the start of her trial, Bayan's testimony was neither material nor exculpatory to Lambert. See id. After hearing prosecutor Kenneff's testimony, the PCRA court determined that Kenneff evaluated his discovery obligations and communicated with Lambert's counsel, Mr. Shirk, about Lambert's position. See id. Shirk confirmed Lambert's story that she was picked up on Oak View Road after fleeing from Show's condominium. Upon confirmation of Lambert's story by Shirk, the PCRA court

determined that Kenneff did not have an obligation to disclose Bayan's testimony to Lambert before trial. See id.

_____After the Commonwealth rested its case and during Lambert's case-in-chief, Lambert changed her story, claiming that Yunkin was inside the complex. The PCRA Court found:

When Ms. Lambert changed her story at trial, Mr. Kenneff's obligation was the same: to disclose evidence that was exculpatory. Ms. Bayan's testimony was not exculpatory merely because Ms. Lambert calls it exculpatory. It is true that Ms. Bayan's statement, if credible, would support some part of Ms. Lambert's trial testimony. Ms. Bayan's statement would support only Ms. Lambert's description of how she fled that morning. Yet, Ms. Lambert's own testimony put her in flight from the condominium after participating in an assault which led to a murder. Her trial testimony established that she was deeply involved in the conspiracy and the murder. Ms. Bayan's statement might have been inculpatory to Mr. Yunkin but not exculpatory to Ms. Lambert.

PCRA Opinion at *72.⁵³ Thus, the PCRA court determined that Bayan's testimony was not exculpatory to Lambert. PCRA Opinion at *72. Significantly, the PCRA court also found that by Lambert's own admission of going with Buck to Show's condominium that morning, of planning and participating in an assault on Show which led to Show's death, "she would still be guilty of first degree murder." Id. at 73. The Pennsylvania Superior Court affirmed the PCRA court.

After reviewing the record, I uphold the PCRA court's factual determination that in light of Lambert's own trial testimony, Bayan's statement was not exculpatory. This finding is based upon the confirmation of Lambert's story by Shirk. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply

⁵³ As an aside, the PCRA court also noted two significant credibility issues concerning Bayan's testimony. First, "she appeared less than completely credible as she answered the questions." PCRA Opinion at *70. The "second and more important issue" concerning Bayan's credibility is that she had an active warrant for her arrest, arising out of her failure to pay county tax obligations while she was a resident of Lancaster County. Id.

to this factual and credibility determination, nor it was an unreasonable determination of the facts in light of the evidence presented to the PCRA court. See § 2254(d)(2).

To establish a violation of Brady on the grounds that Kenneff failed to disclose Bayan's testimony, Lambert must demonstrate that Bayan's testimony was favorable to her because it was exculpatory and that it was outcome determinative. See Strickler, 527 U.S. at 281-82. Lambert fails to establish that Bayan's testimony is exculpatory to her. Even if it were exculpatory, because Lambert's own testimony established that she was deeply involved in the conspiracy and the murder, she cannot demonstrate that in light of the Commonwealth's failure to disclose the testimony, there is a reasonable probability that the result of her trial would have been different. See id. The Commonwealth's alleged Brady violations, including Lambert's allegation regarding Bayan's statement, did not infect Lambert's trial with unfairness so as to make her conviction a denial of due process. See Donnelly 416 U.S. at 643. The PCRA court's conclusion that the Commonwealth did not commit prosecutorial misconduct under Brady by failing to disclose Bayan's statement was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(d) The "29 Questions"

The "29 Questions" is a document created by Lambert and Yunkin while they were in prison awaiting trial. Lambert wrote out a series of questions and hid the document in a book in the prison library. Yunkin wrote out answers to Lambert's questions. Lambert argues that after-discovered evidence regarding this document gives it added weight and is inculpatory to Yunkin and exculpatory to Lambert. Pet. Supp. at ¶¶ 50-53. Lambert claims that Yunkin testified falsely at her 1992 trial regarding two features of the document: (1) the word crossed out in his answer "I remember seeing [name crossed out] dead, was the word, "Tressa" and not the word, "Laurie;" and (2) the

questions that Lambert wrote out in pencil had been altered. Lambert argues that the Commonwealth committed misconduct under Giglio and its progeny because it knowingly put on Yunkin's perjured testimony concerning this document. Pet. Supp. at ¶ 50.

The PCRA court determined that the trial court made clear in its opinion on Lambert's post-verdict motions that it did not find Yunkin credible and had reservations about the reliability of the "29 Questions." PCRA Opinion at *48-49. The trial court fully considered the "29 questions" at Lambert's 1992 trial. See id. The PCRA court found that the Commonwealth did not make any effort to hide or bolster what Yunkin said. In 1992, the trial court assessed the "29 Questions" "as inherently suspicious and of very little help to the fact finder....To say this document is a confession by Mr. Yunkin is simply wrong....all petitioner can say is that Mr. Yunkin testified in a way that was disputed by expert testimony. That argument goes to the weight of Mr. Yunkin's testimony and the court gave very little weight to Mr. Yunkin's testimony." Id. at 49-50. The PCRA court concluded that the Commonwealth did not knowingly put on perjured testimony and, even if perjured, Yunkin's testimony could not have prejudiced Lambert because the trial court gave it very little weight. See id. Thus, Yunkin's testimony about the "29 Questions" did not constitute a Giglio violation. The Pennsylvania Superior Court affirmed the PCRA court's findings.

After reviewing the record, I uphold the PCRA court's factual determinations that the Commonwealth did not make any effort to hide or bolster what Yunkin said, that the Commonwealth did not knowingly put on perjured testimony, and that the trial court gave Yunkin's testimony very little weight in Lambert's 1992 trial.⁵⁴ Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply

⁵⁴ Although the PCRA court questioned Yunkin's credibility as a witness, it did not find that Lambert perjured himself concerning the "29 Questions." Therefore, I review only the PCRA court's factual determination of whether the Commonwealth "knowingly" put on perjured testimony.

to these factual and credibility determinations. Thus, the PCRA court's decision that the Commonwealth did not commit prosecutorial misconduct by presenting Yunkin's testimony about the "29 Questions" was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

To establish a violation of Giglio, Lambert must demonstrate that the Commonwealth knowingly used Yunkin's perjured testimony to obtain her conviction and that the use of Yunkin's perjured testimony caused her actual prejudice. Under the PCRA court's finding that I upheld, Yunkin's testimony concerning the "29 Questions" was not perjured. Even assuming Yunkin's testimony concerning the "29 Questions" was perjured, Lambert did not suffer prejudice because the trial court gave Yunkin's testimony little weight. Yunkin's testimony concerning the "29 Questions" did not infect Lambert's trial with unfairness, so as to make her conviction a denial of due process. See Donnelly 416 U.S. at 643. The PCRA court's conclusion that the Commonwealth did not commit prosecutorial misconduct by presenting Yunkin's testimony was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(e) Officer Reed's Taking the Fifth

At the PCRA hearing, Lambert called Robert S. Reed ("Reed") as a witness. Reed is a former East Lampeter Township police officer and participated to some extent in the investigation of Lambert's case. In the earlier proceeding in this court, Judge Dalzell referred Reed to the United States Attorney's Office for an investigation. Two days before the PCRA hearing, Reed had been convicted of several felonies, including sexual assault on a minor.

At the PCRA hearing, Reed asserted his Fifth Amendment privilege in response to all questions. The PCRA court ruled that Reed properly invoked his Fifth Amendment privilege in light of the allegations made against him as a result of the earlier proceedings

before Judge Dalzell. Rather than draw an adverse inference from Reed's assertion of the privilege, the PCRA court found him "unavailable" and used his testimony from the earlier federal proceeding before Judge Dalzell. PCRA Opinion at *108-09. Lambert suggests that the PCRA court erred when it permitted Reed to assert his Fifth Amendment privilege, although the court had previously stated that it would direct the witness to respond to non-Fifth Amendment issues. Lambert also argues that the fact that Reed asserted his Fifth Amendment privilege "alone establishes gross prosecutorial misconduct." Pet. Supp. at ¶ 68. Lambert also argues that Reed's federal testimony "establishes beyond argument that Reed authored an intentionally false police report and intentionally lied about it in federal court," and thus entitles her to relief. Id.

The Pennsylvania Superior Court ruled that the PCRA court "properly denied the adverse inference requested on behalf of [Lambert.]" Superior Court Opinion at 337. Lambert does not explain how Reed's assertion of his Fifth Amendment privilege rises to the level of a constitutional violation. Lambert provides no support for her claim that Reed's assertion of his Fifth Amendment privilege at the PCRA hearing violated Lambert's constitutional rights.⁵⁵ A federal court may intervene in the state judicial process only to correct wrongs of a constitutional dimension. See Wainwright, 464 U.S. at 83. The conclusion of law that Reed's assertion of his Fifth Amendment privilege at the PCRA hearing does not rise to the level of a constitutional violation at the 1992 trial, was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

⁵⁵ Lambert cites two cases to support her position: (1) United States v. Wallach, 979 F.2d 912, 916 (2d Cir. 1992) (holding that double jeopardy does not bar retrial after reversal of conviction on ground that prosecution should have known that government witness' trial testimony was false) and; (2) United States v. Russell, 411 U.S. 423 (1993) (holding that deception by law enforcement officer did not defeat prosecution of the defendant). Neither of these cases support Lambert's claim.

(f) The Commonwealth's Use of Tabitha Buck as a Witness

Lambert claims further prosecutorial misconduct because the Commonwealth called Tabitha Buck to testify at the PCRA hearing, even though she had committed perjury during the earlier federal proceeding before Judge Dalzell. *Id.* at ¶ 69. Lambert is not clear, but presumably she believes that this constitutes a violation of Giglio's prohibition against the prosecution's presentation of perjured testimony at trial. Lambert also challenges the PCRA court's determination of Buck's credibility.

During cross examination in her PCRA hearing, Buck admitted that she lied in her April 1997 federal deposition by offering incomplete answers. Buck testified that she left out certain issues in her deposition testimony.⁵⁶ Because of Buck's previous testimony, the PCRA court "faced an unusual and interesting credibility assessment with this witness." PCRA Opinion at *63. I quote extensively from the PCRA court's explanation of its credibility assessment of Buck:

[Buck] has acknowledged that she was less than completely truthful under oath. It appears that on several points she told the truth but not the whole truth. On other points, she made statements contrary to the truth. Yet, almost immediately she confessed these lies to her lawyer ... Her lack of truthfulness did not help or hurt her own situation, given that she is serving a life sentence for murder. To this end, it is unlikely that fear of perjury charges would have motivated her to confess her lack of honesty to her attorney ... Further, her decision not to tell the whole truth did not hurt Ms. Lambert. In fact, Ms. Buck soft-pedaled certain facts regarding Ms. Lambert's involvement. Had these "lies" been for a malicious purpose, i.e. to prejudice Ms. Lambert's petition in federal court, they might carry greater weight. It appears that the "lies" were an effort, however ignoble, to help her former co-defendant. She explained this as a feeling of sympathy not so much for her

⁵⁶ Buck allegedly left out the following issues: (1) she did not speak about Lambert placing a rope around Show's neck; (2) she did not discuss Lambert's feelings about Show; (3) she did not talk about her sunglasses; (4) she did not talk about Lambert making the last cut on Show's throat; (5) she did not discuss that Lambert told her that Lambert called Mrs. Show the night before the murder; (6) that Lambert told her not to wear make-up and nail polish and to put her "hair up"; (7) that Lambert handed the knife to her during the attack; (8) that Lambert told her to "cut Laurie's throat"; and (9) that she lied about wearing black stretch pants because she knew that her jeans had blood on them and did not want to admit that. PCRA Opinion at *61.

former co-defendant but for a fellow "lifer"...Petitioner's counsel did a good and thorough job of exposing these various lies in cross examination of Ms. Buck. Petitioner would have us completely disregard Ms. Buck's testimony on that basis. This is not the law, however....In evaluating credibility, the court looks to how the witness testifies, what the witness says, what interest the witness has in the outcome of the proceeding and the relationship of the witness to the petitioner/defendant or others involved in the case. The court considers whether, in general, the witnesses' testimony makes sense. We look not only at the witness herself, and her background and history in the case, but also to extrinsic factors which impact on credibility....One very important factor is whether the witness is willing to falsify testimony so as to further her own interests. This does not seem to be the case with Tabitha Buck. At the PCRA hearing, we had the benefit of an exchange of letters between petitioner's counsel and Ms. Buck regarding petitioner's intentions in the federal habeas proceeding. Ms. Buck received a "solicitation" of sorts from petitioner's counsel, Ms. Rainville. Ms. Rainville was writing to Ms. Buck with a request for cooperation and a suggestion that she may wish to follow Ms. Lambert's path through federal court with a federal habeas petition of her own. Ms. Buck replied, also in writing, with certain statements that provide insight to her credibility and which confirm certain statements she made in her testimony at the PCRA hearing....While we believe that Ms. Buck's decision to withhold portions of the truth in her deposition testimony and in her discussions with Detective Geese was unfortunate, we do not think that this choice establishes that she is a wholly untruthful person who is not worthy of belief in any way in this proceeding. In fact, she relates aspects of the story which are consistent with other testimony in evidence and which are consistent in general terms with her letter to Ms. Rainville written prior to the deposition....From Ms. Buck's testimony, we can conclude with certainty that Ms. Lambert is anything but innocent of the charge of murder. Ms. Buck's testimony is consistent with the observations made by Mr. Kleinhans, Mr. and Mrs. Fry, and with the history of hatred and animus demonstrated by Ms. Lambert during the summer and fall of 1991. The evidence as to Ms. Lambert's planning of the assault, Ms. Lambert's and Ms. Buck's approach to the condominium, their escape, and their activities the remainder of the day of December 20, 1991, is consistent with much of the evidence both at trial and the PCRA.

PCRA Opinion at 64-68. The PCRA court was in the best position to determine the credibility of Buck's testimony. The PCRA court thoroughly analyzed Buck's credibility. In light of the record as a whole, Buck's testimony did not actually prejudice Lambert.

After reviewing the record, I uphold the PCRA court's determinations that Buck's testimony: (1) is credible concerning the key events surrounding Show's murder on December 20, 1991; (2) establishes that Lambert is anything but innocent of the charge of

murder; (3) is not exculpatory to Lambert; and (4) is supported by the testimony of other witnesses and evidence that Lambert planned the assault on Show on the morning of December 20, 1991. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to the PCRA court's factual and credibility determinations. Thus, the PCRA court's decision that Buck's testimony is not exculpatory to Lambert was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

The PCRA court did not make an explicit finding regarding whether the Commonwealth committed misconduct by presenting Buck's testimony. Lambert cannot demonstrate, however, that the Commonwealth's presentation of Buck's testimony to the PCRA court constituted prosecutorial misconduct under Giglio. Whether or not the Commonwealth knowingly presented Buck's perjured testimony to the PCRA court, it did not have an "injurious effect or influence upon" Judge Stengel's determination of Lambert's guilt in her 1992 trial. Brecht, 507 U.S. at 637. Buck's testimony before the PCRA court was consistent with much of the other evidence that supported Lambert's conviction in her 1992 trial, and thus only provided further support for the findings of the trial court and the PCRA court that Lambert is not innocent of the charge of murder. The PCRA court's decision to permit the Commonwealth to present Buck's testimony was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(g) The Dying Declaration

Laurie Show's mother testified in Lambert's 1992 trial that Laurie Show uttered a dying declaration to her in which she identified Lambert as the killer. Mrs. Show testified in 1992 that, after returning home from Laurie's school, she found Laurie in her bedroom and, as she cradled Laurie's head in her arms, Laurie said, "Michelle did it...Michelle...Michelle...I love you...I love you...I love you." (N.T., Trial at 793, 795,

818). This dying declaration played a central role in the 1992 trial, the prior federal habeas hearing, and the PCRA hearing.⁵⁷

Lambert's federal habeas petition advances two related arguments concerning the dying declaration. First, Lambert argues that the prosecution committed misconduct by "disowning trial evidence that it used to convict and ask for the death penalty" and that its experts "found it necessary to change the facts and to disown the evidence that formed the basis for Lambert's conviction." Pet. Supp. at ¶¶ 91, 88. Second, Lambert argues that "there is simply no credible basis for the PCRA court's conclusions concerning the dying declaration." *Id.* at ¶ 99.

The PCRA court sifted through the vast, and sometimes complicated, expert testimony concerning the dying declaration. It heard from six expert witnesses. The PCRA court determined that the essential facts concerning the dying declaration "are the same today as they were in 1991 and 1992." PCRA Opinion at *46. The PCRA court analyzed whether the expert opinions were exculpatory and found that "[t]he opinions are mixed and there is a disagreement among the experts as to whether Laurie Show could have spoken. Certainly the opinions of experts who testified favorably as to petitioner would be exculpatory as to her position. Yet these are only exculpatory *opinions*, not exculpatory facts or evidence." *Id.* at *47. The PCRA court then analyzed the crucial issue regarding the expert testimony about the dying declaration: "would the new

'opinions' have changed the outcome of the trial?" *Id.* The PCRA court determined that: No expert has established that it would have been impossible for Laurie Show to speak. In fact, competent and credible expert testimony proves in a clear and

⁵⁷ In her PCRA petition, Lambert argued that: (1) Show's carotid artery was severed; (2) that Show could not have been conscious at the time she uttered her dying declaration; (3) that speech was medically impossible; (4) the trial court's credibility determinations were incorrect in light of after-discovered evidence that: (a) Dr. Mihalakis received more pay from Lancaster County after the 1992 trial; (b) Dr. Mihalakis changed his testimony; (c) Dr. Annese compromised his testimony because of his familiarity with the Show family; and (d) Mrs. Show did not report the dying declaration until nearly two hours after the murder. PCRA Opinion at *41.

convincing way that the dying declaration was possible. No evidence was presented in 1992 or has been presented in the PCRA hearing which would cause this court to change its finding that Mrs. Show was credible in 1992 when she testified as to her daughter's dying declaration. The expert opinions in 1998, had they been presented in 1992, would not have changed the outcome of the case.

Id. at *48. After considering the opinions of additional experts during the PCRA hearings, the PCRA court determined that such expert testimony, if presented in 1992, would not have changed the outcome of Lambert's trial. See id. The PCRA court enjoyed the benefit of observing and listening to the testimony of the six experts, and it thoroughly analyzed their testimony in light of the trial court record. A review of the record establishes that its credibility determinations regarding the experts' testimony were reasonable. On the crucial issue, the PCRA court determined that the alleged "exculpatory opinions" would not have changed: the finding that Laurie Show's dying declaration was possible, nor the finding that Mrs. Show was credible at the 1992 trial, nor the outcome of Lambert's case. The Pennsylvania Superior Court affirmed the PCRA court.

After reviewing the record, I uphold the PCRA court's factual determinations that the competent and credible expert testimony it heard proved in a clear and convincing way that the dying declaration was possible, and that none of the evidence presented to the PCRA court was sufficient to change its finding that Mrs. Show was credible when she testified to the dying declaration in 1992. Moreover, the expert opinions presented to the PCRA court in 1998 would not have changed the outcome of Lambert's 1992 trial. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual and credibility determinations. Thus, the PCRA court's decisions that: (1) the alleged exculpatory opinions presented by Lambert at the PCRA hearing did not demonstrate that the dying declaration was impossible, and (2) the experts' opinions had they been available in 1992 would not have changed the outcome of the case, were not based on an unreasonable determination of the facts in light of the

evidence presented to it. More importantly, I fail to see a constitutional violation based upon Lambert's assertions regarding the experts.

On a related issue, Lambert argues that prosecutor Kenneff committed misconduct by communicating with the defense's expert witness Dr. Mihalakis, and thus "plainly violated Petitioner's Sixth Amendment rights." Pet. Supp. at ¶ 113. In one of the few places in her supplement in which Lambert relies on legal authority, she supports her claim by citing Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920 (1967).⁵⁸ This issue has been considered exhaustively on Lambert's post-trial motions, by the PCRA court, and the Pennsylvania Superior Court. Shortly before trial, Lambert's counsel informed Kenneff that Mihalakis, a forensic pathologist would be testifying for the defense regarding the dying declaration. Since April 1992, Mihalakis had performed forensic pathology services in criminal cases for the County of Lancaster. On the weekend before Lambert's trial, Kenneff called Mihalakis to express his concern about the doctor's decision to testify for the defense. Lambert believes that pursuant to this conversation, Mihalakis changed his testimony to help the prosecution.

The trial court considered this issue in 1994 on Lambert's post-trial motions and determined that there was nothing about Mihalakis' testimony that was inconsistent with the report he prepared for the defense. See PCRA Opinion at *78. At the PCRA hearing, Lambert presented "after-discovered" evidence that the County of Lancaster increased Mihalakis's compensation following the trial. The PCRA court determined that Mihalakis's increase in compensation had a simple explanation: Mihalakis performed more autopsies because there were more murders in Lancaster County than in previous

⁵⁸ In Washington, the Court held that the State of Texas denied the petitioner "his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." Washington, 388 U.S. at 23.

years. Id. at *81. The PCRA court also considered Lambert's argument that Kenneff tampered with her witness Mihalakis. The PCRA court found that:

While the contact between Mr. Kenneff and Dr. Mihalakis created an issue in the 1992 trial, this court saw no reason for a mistrial based on a demonstrated lack of prejudice to petitioner. This court saw no basis on which to refer Mr. Kenneff to the Disciplinary Board. This court also notes that in the ensuing years, neither Mr. Shirk, nor Mr. Goldberg, nor Mr. Epstein, nor Ms. Lambert, nor Ms. Lambert's family saw fit to refer this issue to the disciplinary authorities. It was arguably improper conduct with some justification under the circumstances. The bottom line is that it did not affect the witness's testimony at trial. He testified consistent with his report and his testimony was no surprise to petitioner's counsel.

PCRA Opinion at *82. The Pennsylvania Superior Court determined that the PCRA court "properly rejected" Lambert's claim. Superior Court Opinion at 346. Kenneff's contact with Mihalakis did not violate Lambert's Sixth Amendment rights.

After reviewing the record, I uphold the PCRA court's factual determinations that the contact between Kenneff and Mihalakis did not affect Mihalakis's testimony at trial, that Mihalakis testified consistent with his report, and that Lambert's counsel was not surprised by that testimony. Lambert does not present any evidence that challenges in any way the integrity of this finding. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual determinations. The PCRA court's decision that Kenneff's contact with Mihalakis did not constitute prosecutorial misconduct was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

Lambert cannot establish that Kenneff committed prosecutorial misconduct because she cannot demonstrate prejudice as a result of the contact between Kenneff and Mihalakis. See Strickler, 527 U.S. at 281-82. The trial court found no reason for declaring a mistrial in Lambert's 1992 trial because Lambert did not suffer prejudice as a result of the contact between Kenneff and Mihalakis. This conclusion remains the same today. The conclusion of the PCRA court that Kenneff did not commit prosecutorial

misconduct by contacting Kenneff before Lambert's 1992 trial was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(h) The River Search

In this section of her supplement, Lambert contends that the Commonwealth's witnesses perjured themselves when they testified about their search of the Susquehanna River shortly after the murder. Lambert claims that after the murder Yunkin put his size 12 sneakers, worn on the morning of the murder, along with other items, into a pink trash bag, weighted it down with rocks, and ordered Lambert to throw it into the river.⁵⁹ When Lambert threw it, however, it landed on the rocky riverbank.

On December 22, 1991, two days after the murder, the East Lampeter Township Police Department, with the assistance of local scuba divers performed a search of the Susquehanna River near the Pequea Creek inlet. The search turned up a large butcher knife and a rope. William "Smokey" Roberts, a professional scuba diver and videographer, filmed the search. He reviewed, edited, and copied the tape for the police and district attorney's office, which turned the tape over to Lambert's defense attorney Shirk.⁶⁰

Lambert claims that the riverbank search was videotaped and edited for trial, thus allowing the Commonwealth witnesses, like Detective Barley, to commit perjury to impeach Lambert's credibility. Pet. Supp. at ¶¶ 122-27. Lambert also claims that the bag containing Yunkin's sneakers was never found. During the proceedings before Judge Dalzell, the Commonwealth produced an unedited version of the river search videotape

⁵⁹ During cross-examination at trial, Lambert explained that they first placed the items in a white bag and that when they arrived at the river, Yunkin took the white bag and placed it inside a red trash bag weighted down with rocks.

⁶⁰ Roberts edited the tape to cut out walking, cut down on spam time and to eliminate background noise.

that Lambert claims shows a pink bag located precisely where she contends she threw it. Lambert claims that the police and/or prosecution committed misconduct by editing the tape to delete allegedly exculpatory evidence of the police finding a pink bag by the river in the location that Lambert claims it landed after she threw it.

Lambert contends that the police edited the video to delete allegedly exculpatory evidence of the police finding a pink bag at the river making it easier for the Commonwealth to impeach her. Pet. Supp. at ¶ 122. This claim is thus part and parcel of Lambert's broader claim that the Commonwealth framed her. Id. at ¶ 127. The edited video, however, showed an empty pink bag embedded in the ice. PCRA Opinion at *91. The police did not recover the bag because they considered it immaterial to the case. The tape also showed another empty bag of indeterminate color which the police also considered irrelevant to the investigation.⁶¹ The PCRA court reviewed both the edited tape and the unedited tape and heard testimony concerning the search. It concluded that both bags were empty.⁶² PCRA Opinion at *91. Furthermore, it found that, even accepting Lambert's claim, the fact that she assisted Yunkin in discarding the contents of

⁶¹ The police performed a second untaped search on December 23, 1991 which turned up a sneaker in the Pequea Creek. Because of its obviously aged and worn appearance, the detectives determined that it did not have any evidentiary value. Lambert claims that this sneaker was exculpatory. The PCRA court determined that this could not have been the sneaker for which the police were searching, especially because, unlike the rope and knife, it was found in the creek and not the river. PCRA Opinion at *92. Lambert's allegation also overlooks the fact that "at the time of the search, the police would have believed that anything found in the river relating to the murder would incriminate Ms. Lambert because Ms. Lambert was the person who disposed of the evidence." Id.

⁶² At trial, in response to questioning by defense counsel Shirk, Detective Barley testified that he did not find a trash bag containing sneakers. Shirk did not attempt to impeach Barley's testimony on this issue. Barley's denial that he found a trash bag containing sneakers was not an issue at trial. The Commonwealth never denied that Lambert threw the bag into the river. In fact, it introduced Yunkin's testimony that Lambert did throw the bag into the river. "This testimony had no effect on the outcome of the trial." PCRA Opinion at *91.

the bag "would have been further evidence of her involvement in the murder or in the conspiracy." Id.

After reviewing the record, I uphold the PCRA court's findings concerning the river search, including its determinations that: (1) the Commonwealth did not edit the videotape to delete evidence exculpatory to Lambert; (2) both the bag on the edited videotape and the bag on the unedited video tape were empty; (3) the police did not recover certain evidence, like the pink bag embedded in the ice and shown on the edited tape, because it was immaterial to the case; and (4) the Commonwealth's witnesses to the river search were credible. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual determinations. And, the PCRA court's findings were not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

Once the factual findings of the PCRA court are upheld, Lambert cannot establish prosecutorial misconduct under Brady because none of the evidence either found during the river search or captured on tape was potentially exculpatory to her. See Brady, 373 U.S. at 104. Also, Lambert cannot establish a Giglio violation because the Commonwealth's witnesses to the river search did not commit perjury. Finally, Lambert claims that the Commonwealth violated Youngblood by editing the videotape to delete exculpatory evidence of the police finding a pink bag at the river. The PCRA court found – a finding that was upheld – that the police did not edit the videotape for the purpose of deleting evidence exculpatory to Lambert. Even assuming that the portions of the videotape that the Commonwealth edited were exculpatory to Lambert, there is no evidence that the Commonwealth edited the tape in "bad faith." Youngblood, 488 U.S. at 58. Absent such evidence, Lambert cannot establish a constitutional violation arising out of the river search. The PCRA court's conclusion that the Commonwealth did not commit prosecutorial misconduct arising out of the river search was neither contrary to, nor

involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(i) Lambert's Statement Contained Fabricated Pages

Early in the morning of December 21, 1991, Lambert provided a statement to Corporal Raymond Solt of the Pennsylvania State Police that has been referred to throughout the history of this case as the "Solt Statement." Solt administered a polygraph examination to which Lambert had consented. Lambert provided Solt with two separate statements. Before the polygraph, Lambert provided Solt with a handwritten statement containing what has become known as the "alibi story" because Lambert, Buck, and Yunkin created it in preparation for police questioning. PCRA Opinion at *92. During the polygraph, Solt advised Lambert that he thought she was not being truthful at which point Lambert began to depart from her story, and Solt began to take a second statement from her, i.e. the "Solt statement."

The "Solt statement" consists of five-and-a-half typed pages, each of which Lambert signed. At the bottom of page six and extending to page seven, Solt transcribed first in hand printed lettering and then in cursive writing Lambert's responses to his questions to her about whether she had anything further to add to the statement. Lambert also signed the printed and hand-written pages.

Lambert claims that the Solt statement is in almost all respects exculpatory, but should be disregarded because Solt altered Lambert's statement to include an admission that she wore Yunkin's clothes on the day of the murder. Pet. Supp. at ¶ 135. She argues that the last one-and-a-half pages of her statement are a fabrication. Before the PCRA court, Lambert argued that she signed blank papers at the time of her interview and that she did not understand why she was doing that. Solt allegedly filled in the blank pages with a statement he created and attributed to Lambert. To support this claim, Lambert argues that: Solt typed the first five-and-a-half pages of the statement, but handwrote the

last page and a half; Solt prepared the statement on two types of paper, typing bond and cheap copy paper; the handwritten addition to the statement is fabricated; Solt's testimony regarding the statement lacked credibility; and "it never occurred to her that her statement might contain something that she did not say." Id. at ¶ 136-145. Thus, Lambert claims that the Commonwealth committed prosecutorial misconduct because Solt fabricated Lambert's statement and the Commonwealth introduced the fabricated statement at trial. This claim is another thread of Lambert's argument that the Commonwealth framed her. See id.

The PCRA court heard testimony regarding the statement from numerous experts called by the prosecution and the defense. The PCRA court also analyzed Solt's testimony, as well as Lambert's testimony from her 1992 trial at which she "expressed familiarity" with the contents of the statement. PCRA Opinion at *96. Also, in a letter to Yunkin on December 23, 1991, Lambert "adopted the information she gave to Corporal Solt in the statement." Id. Therefore, the PCRA court determined that "[a]ny contention that the handwritten (or printed) portion of the statement was made up by Corporal Solt after Ms. Lambert signed the statement is clearly contradicted by her own testimony at trial and her own handwritten letter to Mr. Yunkin of December 23, 1991."⁶³ PCRA Opinion at *97. The PCRA court weighed the expert testimony, Lambert's testimony, Solt's testimony, together with all the other evidence in this case from the 1992 trial, and found that Lambert's assertion that Solt altered her statement "is without merit under any analysis." Id. at 98. Thus, the PCRA court ruled that the issue of the altered Solt statement did not involve prosecutorial misconduct or after-discovered evidence. See id.

_____After reviewing the record, I uphold the PCRA court's (1) factual determinations that Solt did not fabricate any part of Lambert's statement; and (2) its credibility

⁶³ The PCRA court also determined that "[t]here is absolutely no support in the record for the allegation that Ms. Lambert was injected with truth serum," as Lambert had argued. Id. at *96.

assessments of the experts who testified on the Solt Statement. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual determinations. Thus, the PCRA court's decision that the Commonwealth did not commit prosecutorial misconduct concerning the Solt Statement was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

There is no basis on which to find that the Commonwealth committed prosecutorial misconduct concerning the Solt statement. The evidence in the statement is not exculpatory to Lambert and the Commonwealth did not suppress the statement. The statement prepared by Solt did not infect Lambert's trial with unfairness, so as to make her conviction a denial of due process. See Donnelly, 416 U.S. at 643. The conclusion of the PCRA court that Lambert failed to prove that the Commonwealth committed prosecutorial misconduct was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(j) The Commonwealth's Destruction of and Failure to Maintain Evidence

In further support of her claim that the Commonwealth framed her, Lambert argues that "all or nearly all of the physical evidence that [she] could have used to prove her innocence 'disappeared' long before her trial, despite the fact that the Commonwealth knew or should have known that the evidence was material at the time it 'disappeared.'" Pet. Supp. at ¶ 149. Lambert alleges that the Commonwealth destroyed or failed to preserve numerous items of evidence that: (1) could have proven the falsity of Show's declaration, including photographs of the victim's neck and the 911 operator's determination that Show was unconscious, and therefore could not have uttered the dying declaration; (2) linked Yunkin to the crime, including the pink trash bag the police found at the river, the unedited river search video, an extra license plate in Yunkin's car, and the sweatpants; (3) could have demonstrated Buck's involvement in the murder; (4) Lambert

could have validated her story about the location of the telephone and the scissors that Lambert testified were at the crime scene; (5) could have been used to prove the falsity of Lambert's initial statement. Pet. Supp. at ¶¶ 149-151. In this part of her supplement, Lambert simply lists the various items of evidence she believes the Commonwealth destroyed or failed to maintain. Lambert claims that much of this evidence "could have" supported her theory of her case. Pet. Supp. at ¶ 149(b), (d), (f), (g), (i), (o), (r).

Lambert raised these same issues before the PCRA court and the Pennsylvania Superior Court. The PCRA court exhaustively considered these issues over the course of several pages. For example, the PCRA court found that Lambert's assertion that the police fabricated a crime scene photograph by inserting a white sweatshirt of Buck's into the crime scene and thereby deprived Lambert of ever using the sweatshirt as evidence that Buck committed the murder, Pet. Supp. at ¶ 149(s), is "without any foundation in the evidence." PCRA Opinion at *102. Following a review of the PCRA court's findings, the Pennsylvania Superior Court concluded that "most if not all of these items are not exculpatory, if indeed they even exist."⁶⁴ Superior Court Opinion at 353. Lambert's claims that the Commonwealth destroyed evidence are based primarily on speculation.

I uphold the PCRA court's factual determination that the Commonwealth did not destroy evidence. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to the PCRA court's factual determination. Thus, the PCRA court's decision that the Commonwealth did not destroy evidence was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

Because there is no evidence that the Commonwealth destroyed any evidence, Lambert cannot establish a violation of Youngblood. The significant point is that even if

⁶⁴ The Pennsylvania Superior Court also found that "[a]ppellant's conclusory characterization of these items without more does not constitute a valid issue on appeal." Superior Court Opinion at *353.

the evidence existed, and even if it were somehow exculpatory to Lambert, she fails to establish that the Commonwealth destroyed or failed to maintain and preserve the evidence in "bad faith." Youngblood, 488 U.S. at 58. The conclusion of the PCRA court that the Commonwealth did not commit prosecutorial misconduct by destroying evidence in violation of Youngblood was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(k) The Commonwealth's Presentation of False Evidence

In this section of her supplement, Lambert claims that the Commonwealth offered a great deal of evidence in the 1992 trial that it knew or should have known was false in violation of its duties under Brady and Giglio. Pet. Supp. at ¶¶ 152-185. The Commonwealth's presentation of false evidence, according to Lambert, reflects its attempt to frame her. Among other things, Lambert claims that the Commonwealth: altered Yunkin's audiotaped and written statements as a means of hiding favorable evidence from her; prepared false police reports about the rope found at the crime scene to incriminate Lambert; presented a false autopsy report; and altered Lambert's statement to add that she wore Yunkin's clothing on the day of the murder.

Many of these claims have been discussed above. As with many of Lambert's other claims, her allegations that the Commonwealth presented false evidence often rest on empty speculation. The PCRA court patiently and thoroughly analyzed Lambert's claims that the Commonwealth presented false evidence. The PCRA court determined that the Commonwealth did not present any false evidence in the 1992 trial that could establish a violation of Brady or Giglio.

After reviewing the record, I uphold the PCRA court's factual determination that the Commonwealth did not present false evidence. Lambert fails to demonstrate clearly

and convincingly that a presumption of correctness should not apply to this factual determination. Thus, the PCRA court's decision that the Commonwealth did not present false evidence in the 1992 trial was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

There is no evidence that the Commonwealth presented false evidence in the 1992 trial. Lambert's conviction did not violate due process. The PCRA court's conclusion that the Commonwealth did not present false evidence in Lambert's 1992 trial was therefore neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(l) The Abuse Issue Including the Cambridge Springs Rapes

Throughout her proceedings, and especially before the PCRA court, Lambert characterized herself as a victim of abuse, in part to explain why she initially attempted to cover up for Yunkin. Lambert and Yunkin apparently had an abusive relationship and Lambert asserted before the PCRA court that Yunkin possessed an abusive and domineering personality to which she was subject. But one troubling aspect of the history of this case concerns a sexual assault on Lambert by a corrections officer at the State Correctional Institution at Cambridge Springs. Lambert claims that while at Cambridge Springs, "she was unable to focus on her case during her state appeals because she was being raped by a prison guard at Cambridge Springs, and then was subsequently sent to the 'hole' for her own safety while she was incarcerated there." Pet. Supp. at ¶ 186. The PCRA court found that the horrible incident did not prevent Lambert from offering her assistance to her appellate counsel Mr. Epstein, and it did not prevent her from assisting in her PCRA proceedings years later. PCRA Opinion at *57. Lambert also claims that during the PCRA hearing, the Commonwealth committed prosecutorial misconduct by

arguing that the sex between Lambert and the correctional officer was consensual, even after the conviction of the correctional officer who assaulted her.⁶⁵ Pet. Supp. at ¶ 186.

I uphold the PCRA court's factual determination that Lambert's rape by the prison guard did not prevent her from assisting in her appeals. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to this factual determination. The PCRA court's decision that the assault on Lambert did not prevent her from assisting with her appeals was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

The prosecution did not commit prosecutorial misconduct with regard to the evidence it presented about the assault on Lambert during the proceedings before the PCRA court. The deplorable events that occurred while Lambert was at Cambridge Springs happened after Lambert's 1992 trial, and thus did not have any impact on the outcome of her trial. Furthermore, the Commonwealth's presentation of evidence at the PCRA hearing that the sex between Lambert and the correctional officer was consensual does not rise to the level of prosecutorial misconduct under Brady and its progeny.

(m) Ineffective Assistance of Counsel

Lambert claims that "while the Commonwealth's willingness to destroy evidence, fabricate evidence, knowingly utilize false evidence, tamper with witnesses ... coupled with the trial/PCRA court's ingrained bias and prejudice, likely would have made this case an overwhelming challenge for the greatest lawyers of the century," Lambert's trial

⁶⁵ The correctional officer was charged and convicted of each of the following crimes: aggravated indecent assault, indecent assault, and official oppression; under Pennsylvania law at the time, forcible sexual conduct was not an element of any of these crimes. PCRA Opinion at *56 n.72 (citing sections of the Pennsylvania criminal law). As the PCRA court explained, "[t]o suggest that the incidents involving Ms. Lambert were not 'rape' is not to diminish them or to excuse them. They should never have happened and the state corrections system and the authorities in Crawford County took action in response to this conduct." PCRA Opinion at *57.

counsel Roy Shirk, Esq. and her appellate counsel Jules Epstein, Esq. were nevertheless ineffective because they failed to pursue claims that in all reasonable probability would have changed the outcome of Lambert's case. Pet. Supp. at ¶ 374 n.29. To prove ineffective assistance of counsel, a petitioner must prove by a preponderance of the evidence, that: (1) his or her attorney's performance was, under all the circumstances, unreasonable under prevailing professional norms; and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result would have been different" Strickland, 466 U.S. at 694.

In her second post-trial motion, Lambert claimed that Shirk was ineffective because he failed to: (1) call character witnesses in her defense; (2) introduce evidence of abuse by Yunkin; (3) call a witness to contradict testimony by Yunkin; and (4) seek suppression of statements. Commonwealth v. Lambert, No. 0423-1992, at 4 (March 14, 1995). In findings on post-trial motions, Judge Stengel of the Lancaster County Court of Common Pleas determined that:

Trial counsel's representation of Lisa Michelle Lambert was professional, diligent, and thoughtful. Nothing about the performance of trial counsel suggests in any way sloth or ignorance of available opportunities. Nothing that trial counsel did was without a reasonable basis. There is simply no basis in the law or in the facts for a finding that Roy D. Shirk, Esquire, was ineffective in his representation of Lisa Michelle Lambert.

Id. at 40. Thus, Judge Stengel denied Lambert's motion for a new trial.

Before the PCRA court, Lambert claimed that Shirk was ineffective because he failed to: push for more discovery; call character witnesses; use an expert in speech for the purpose of evaluating Show's dying declaration; use an expert on rape and abuse trauma; use an expert in pathology to determine whether major vessels in Show's neck were cut; use an expert in crime scene photography to demonstrate that the prosecution destroyed evidence; use an expert in document authenticity; provide Lambert her statement to review; attack Detective Barley about the pink bag; have Lambert and her

family testify about the "29 Questions;" get an expert to replace Dr. Mihalakis; present available evidence of Yunkin's involvement; have other writings in blood at the scene examined; recognize that the last part of Lambert's statement had been altered; present available evidence that Yunkin was lying about what Lambert wore during the murder; present available corroborating evidence about the date rape; point out the time of death as listed on the autopsy report; present evidence that Lambert was not jealous of the relationship between Show and Yunkin; present evidence in news video footage that Lambert did not appear to be pregnant; present evidence of Yunkin's scratches and bruises; present evidence of "another Michelle" who might have been the killer referred to by Show; and suppress Lambert's statement due to a violation of Pennsylvania's six hour rule. PCRA Opinion at *109-114.

As with Lambert's other claims, the PCRA court carefully examined Lambert's claims of ineffective assistance of counsel on the part of Shirk. The PCRA court found that many of her claims, such as Shirk's failure to point out Show's time of death as listed on the autopsy report, did not have any merit. PCRA Opinion at *113. Shirk generally "showed good sense and effective trial strategy," for example by not impeaching Detective Barley on collateral issues. Id. at *111.

Lambert also argued before the PCRA court that Epstein was ineffective because he failed to: address irregularities in the record; call the expert witnesses called by attorneys Greenberg and Rainville at the federal habeas hearing; move for discovery; raise the six hour rule; and preserve issues raised by Shirk. The PCRA court determined that these claims were without merit. PCRA Opinion at *115.

The most significant point is that, even assuming Shirk and Epstein committed unprofessional errors, the result of Lambert's trial would not have been different. See PCRA Opinion at *135-36. Lambert's argument that Epstein and Shirk were necessarily ineffective because the PCRA court found that certain evidence was available to them, and thus "could have" been presented in earlier proceedings misses the point. Pet. Supp.

at ¶ 375. The PCRA court found that, the fact that Shirk and Epstein could have presented evidence alleged relevant by Lambert's present counsel did not mean that such evidence was in any way material; the result of Lambert's trial and appeal would not have been different had Shirk and Epstein presented the evidence now in dispute. Therefore, Lambert was not prejudiced in any way. The Pennsylvania Superior Court affirmed the decision of the PCRA court.

After reviewing the record, I uphold the PCRA court's factual determinations that Shirk was professional, diligent and thoughtful, and that he generally showed good sense and effective trial strategy. I uphold the PCRA court's findings that Epstein demonstrated professional judgment. I also uphold the finding of the PCRA court that, even assuming Shirk and Epstein committed unprofessional errors, neither the result of Lambert's trial nor the result of her appeals would have been different. Lambert fails to demonstrate clearly and convincingly that a presumption of correctness should not apply to these factual determinations. Thus, the PCRA court's decision that Shirk and Epstein provided Lambert with effective assistance of counsel was not based on an unreasonable determination of the facts in light of the evidence presented to it. See § 2254(d)(2).

Lambert fails to establish a claim for ineffective assistance of counsel because she cannot demonstrate that either the performance of Shirk at trial or the performance of Epstein on appeal was "unreasonable under prevailing professional norms." Day, 969 F.2d at 42. Even if their performance was unreasonable under prevailing professional norms, the results of Lambert's trial and appeal would not be different. The conclusion of the PCRA court that Lambert failed to prove her claim for ineffective assistance of counsel was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1).

(n) The PCRA Court's Bias and Failure to Conduct the Proceeding in a Manner that Allowed the Petitioner to Litigate her Case Properly

In this section of her supplement, Lambert asserts that the PCRA court committed errors that undermined the integrity of the proceedings before the PCRA court. Lambert asserts a litany of claims that, among other things, the PCRA court: refused Lambert the right to cross-examine police and prosecutor witnesses; misrepresented "admissions" that Lambert never made; ignored the proper standard of review; improperly limited the testimony of Dr. Burgess; misconceived the significance of the gang rape evidence; excluded the testimony of petitioner's legal ethics expert; allowed the Commonwealth's forensic pathologist to testify about the supposed credibility of witnesses; refused to allow the sweatpants to be photographed; excluded Yunkin's admission to Feliciano; inconsistently applied the hearsay rule; failed to consider constitutional violations collectively; failed to allow use of the federal record for impeachment; improperly declared that the federal record was "void ab initio" and allowed the Commonwealth a new hearing in violation of Lambert's right of equal protection. See Pet. Supp. at ¶¶ 305-373.

Lambert supports these claims by attacking the authority and integrity of the PCRA proceedings.⁶⁶ Her position is that the PCRA court demonstrated bias toward her at every stage of the proceedings, and therefore its findings are so infused with error that they are entitled to no deference. Lambert makes serious allegations that the PCRA court: (1) made "intentional misstatements...that convicted Petitioner and denied her relief in her PCRA hearing, in addition to the PCRA court's attacks on Petitioner's counsel,

⁶⁶ Co-counsel for Lambert, Peter Greenberg, Esq. expressed his attitude toward the state court proceedings on the record before the PCRA court: "We will go forward as we must to exhaust the alleged state remedies that are allegedly available to this [Appellant], but it's our position that this proceeding is without integrity in terms of finding fact and seeking truth and it's our position that any findings made herein against [Appellant] are entitled to absolutely no deference as a result in any subsequent court." N.T. PCRA (Hearing, 5/5/98), at 783-84.

attacks on the federal court, and its truck load of organic errors in its handling of the proceedings ... show beyond argument the court's ingrained bias and prejudice and lack of impartiality that deprived Petitioner of fundamental fairness, alone violate Petitioner's due process rights;" (2) "manipulated its own findings to prejudice Petitioner;" (3) made findings "based on what [it] read in the newspaper;" (4) "viciously and falsely attacked Petitioner's counsel;" (5) "conducted the proceedings in a manner that wrongfully worked to impede Petitioner from properly putting on her case and turned them into a virtual parody of a bona fide collateral attack hearing;" and (6) "[made] statements that are so grossly erroneous as to cause profound concern and to undermine the credibility of the PCRA court's entire opinion." Pet. Supp. at ¶¶ 190, 291, 296, 297, 318. The gist of Lambert's charge is that the PCRA court's errors reflect its bias and instrumental role in the Commonwealth's framing of Lambert for the murder of Show.

Lambert's claims of error by the PCRA court do not constitute viable federal habeas claims. Even assuming that they did, there is no support in the record for Lambert's claim that the PCRA court "intentionally...worked to impede Petitioner from properly putting on her case" or otherwise demonstrated "ingrained" bias toward her.⁶⁷ Pet. Supp. at ¶¶ 190, 297. As the Pennsylvania Superior Court found, Lambert's "demeaning characterization of the trial/PCRA court is not supported by the record." Superior Court Opinion at 353.⁶⁸ The PCRA court conducted eight weeks of hearings, heard from a total of 112 witnesses, considered 601 exhibits, reviewed 8,000 pages of testimony, and produced a lengthy, detailed and thorough opinion consistent with clearly

⁶⁷ While lawyers are, of course, free to criticize a court's decision, unfounded inflammatory remarks about a judge can violate professional ethics. See In Re Richard Barnett, 97 F.3d 181, 184 (7th Cir. 1996); In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).

⁶⁸ Lambert also alleges that the history of her proceedings demonstrates that she could not be treated fairly by the Pennsylvania courts, including the Pennsylvania Superior Court. Pet. Supp. at ¶¶ 379-394. The record does not support this claim. The Pennsylvania state courts did not violate Lambert's federal constitutional rights.

established federal constitutional law. It then denied Lambert relief on her claims based on this voluminous evidence. The Pennsylvania Superior Court examined Lambert's claims of errors on the part of the PCRA court and affirmed the PCRA court in all respects. Lambert's claims of error by the PCRA court fail to rise to the level of constitutional violations, and thus she is not entitled to habeas relief on these claims.

(o) Actual Innocence

Lambert cannot maintain a claim for actual innocence because: (1) a claim of actual innocence is not by itself a constitutional claim, see Herrera, 506 U.S. at 404; and (2) she does not assert actual innocence to overcome a procedural bar.⁶⁹ See Schlup 513 U.S. at 314-15. Even if Lambert could assert a claim of actual innocence, I would uphold the PCRA court's conclusion that "[t]here is no question that Ms. Lambert is not, and never will be, 'innocent' of this crime" because:

The crime scene photographs, the autopsy photographs, the condition of the condominium, and the condition of the body of Laurie Show led this court to one inescapable conclusion: whoever performed these acts did so with a level of rage completely inconsistent with any accidental killing or a death incidental to a "prank." We firmly believed in 1992 that Lisa Michelle Lambert drew the knife across the throat of Laurie Show, causing her death. She was the only person with the level of emotion, the focus of purpose and the clear opportunity to have performed that dreadful act.

PCRA Opinion at *136. The PCRA court also contends that Lambert was at least guilty of first degree murder on an accomplice basis. PCRA Opinion at *135. No matter the harsh realities that Lambert may have confronted in her life up to December 20, 1991, these do not justify her actions in connection with the murder of Laurie Show on that day. Lambert is not actually innocent of the murder of Laurie Show.

⁶⁹ Also, Lambert is not a capital petitioner, and thus does not fall within the possible exception carved out in Herrera in which the court left open the possibility that a truly persuasive showing of actual innocence after trial might make the execution of a defendant unconstitutional. See Herrera, 506 U.S. at 417.

CONCLUSION

Lambert's litany of allegations – frequently untethered either to a legal or evidentiary foundation – have failed to demonstrate clearly and convincingly that a presumption of correctness should not apply to the well-supported factual determinations of the state courts. The factual determinations of the state courts were not "unreasonable." § 2254(d)(2). Thus, I uphold the factual determinations of the state courts. Also, the legal findings of the state courts regarding each of Lambert's claims were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. See § 2254(d)(1). This conclusion is consistent with the underlying philosophy of the AEDPA. It is the responsibility of a state court to carefully analyze the factual findings before it. Once this responsibility has been honorably undertaken by a state court, the findings of a state court will be upheld by a federal court in habeas review. Accordingly, Lambert is not entitled to relief under § 2254(d), and thus a writ of *habeas corpus* will not be granted.⁷⁰

ORDER

_____ **AND NOW**, this day of April 2003, it is **ORDERED** that:

(1) The petitioner Lisa Michelle Lambert's petition for federal *habeas corpus* relief under 28 U.S.C. § 2254 is **DENIED**, and the petitioner's petition is **DISMISSED WITH PREJUDICE**.

(2) A Certificate of Appealability ("COA") will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §

⁷⁰ I gratefully acknowledge the assistance of my law clerk, Thomas J. Sullivan, in the research and drafting of this opinion.

2253(c)(2). "A petitioner makes a 'substantial showing' of the denial of a constitutional right when he or she demonstrates that his or her petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473 (2000). Although in very different contexts, two federal judges have examined the claims of the petitioner Lambert and have reached different outcomes. Accordingly, a COA will be **GRANTED**.

(3) The motions of the petitioner for: application of and determination of issues under the coordinate jurisdiction doctrine (Docket entry #60); judgment on the pleadings (Docket Entry #63) and; summary judgment (Docket Entry #64) are **DENIED AS MOOT**.

ANITA B. BRODY, J.

Copies **FAXED** on _____ to:

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